Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC. and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), unconstitutionally usurp the judicial function by substantively altering equal protection principles as applied to local zoning laws?

II.

Does the "equal terms" provision of RLUIPA violate the Establishment Clause by giving special deference to religious land uses and by exempting them from neutral laws of general application?

III.

Are plaintiffs required to meet the substantial burden test under Section (a) of RLUIPA as a threshold jurisdictional matter before an "equal terms" violation under Section 2(b) can be found?

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The opinion of the court of appeals is reported at *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). It is reproduced in the appendix at App. A-1a. The orders of the district court are unreported and are reproduced in the appendix at App. D-60a, E-64a, F-81a, G-94a, H-101a, I-127a.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on April 21, 2004. App. A-1a. Rehearing was denied on July 13, 2004. App. J-162a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Article I, Section 8, Clause 3 (Commerce Clause):

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

First Amendment (Establishment Clause; Freedom of Religion, and Speech):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .

Tenth Amendment (Reservation of Powers to States):

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, § 1 (Equal Protection Clause):

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, § 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

RLUIPA, 42 U.S.C.A. § 2000cc:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which —

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability;

or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that —

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA, 42 U.S.C.A. § 2000cc-2(a) and (b):

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

* * * *

STATEMENT OF THE CASE

The Town of Surfside, Florida, is a small, one square-mile town with 4300 residents. Its business district comprises only two blocks. The purpose of the business district is "to provide for retail shopping and personal retail service needs of the Town's residents and tourists." App. A-4a, I-47a. The Town Code mirrors the Town's Comprehensive Plan's objectives to invigorate the business district and to create a strong tax base through its retail and tourist districts in light of a sagging retail environment. App. I-159a.

Surfside's Code has not allowed churches and synagogues in the business district for over forty years, but allows them in Surfside's centrally-located and larger multi-family residential zoning district (RD-1). App. I-129a, I-151a. The business district also excludes all other non-commercial assemblies of a "public or semi-public character," such as educational or philanthropic institutions, public schools, libraries, museums, auditoriums, public and governmental buildings, homeless and animal shelters, food banks, campgrounds, public parks, and playgrounds. App. A-27a, I-47a. Based on its business district goal of serving its residents' shopping and service needs, Surfside categorizes religious institutions with those secular uses. Private clubs are permitted in the business district, but none are located there.

Respondents Midrash Sephardi, Inc. and Young Israel of Bal Harbour, Inc. are two Orthodox Jewish synagogues. In 1997, Midrash subleased space on the second floor of an office building in Surfside's business district to operate its synagogue. Young Israel opened its synagogue in 1999 in Surfside's tourist district, but since November 2000 has been

sharing the business district space occupied by Midrash. App. A-6a, I-128a. The majority of the synagogues' members reside outside of Surfside. App. I-130a. The synagogues did not seek to lease property in the permitted and centrally-located, RD-1 district, contending that their members who live in adjoining towns would have to walk too far to attend services there. *Id.*

Midrash and Young Israel sued Surfside in 1999, alleging violations of the First and Fourteenth Amendments, Florida's Religious Freedom Restoration Act, § 761.01, *et seq.*, Fla. Stat., and (after its enactment in September 2000) the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The graveman of the synagogues' pre-RLUIPA position was that locating in the business district placed them closer to the adjoining towns of Bal Harbour and Bay Harbor Islands, making it easier for their congregants from those towns to walk to services, since they claimed walking to the multi-family district constituted a substantial burden on their congregants' free exercise rights. App. A-2a, A-9a.

The district court granted summary judgment in favor of Surfside on all counts, finding that the synagogues' constitutional and statutory claims were without merit, that its members were not substantially burdened by the Code, and that Surfside's unrebutted expert evidence established that it had a compelling interest in maintaining the commercial nature of the business district to generate revenue and to serve the Town's citizens' retail and service needs. App. D-60a, E-64a, F-81a, G-94a, H-101a, I-127a. The district court also granted summary judgment on Surfside's counterclaim for injunctive and declaratory relief, and entered a permanent injunction against the synagogues, enjoining them from continuing to operate at the present

location in violation of the Code. App. C-58a, D-60a. The district court also found that there was no RLUIPA violation because the equal protection analysis that was embodied in RLUIPA's "equal terms" provision did not support any claim of discrimination against the synagogues. App. E-68a-80a.

The Eleventh Circuit Court of Appeals reversed the judgment, sustaining only the synagogues' "equal terms" challenge under Section (b)(1) of RLUIPA — which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). App. A-24a, 55a.

According to the circuit court, Surfside must allow religious institutions to locate anywhere any other non-religious "assemblies" or "institutions" may be located, which the court broadly defined as "[a] group of persons organized and united for some common purpose." App. A-28a. Since it found that private clubs fit the definition of an "assembly," the circuit court held that Surfside had to allow churches and synagogues anywhere that private clubs were allowed, including the business district, notwithstanding the fact that no clubs exist there. App. A-29a.

The circuit court also found that Surfside's Code did not substantially burden the synagogues' religious rights (App. A-21a-24a), but it ruled that RLUIPA does not require an initial finding that a zoning law "substantially burdens" a religious exercise. App. A-25a-26a. The "substantial burden" test is set forth in the "General rule" under Section (a) of RLUIPA. Instead, the circuit court interpreted Section (b)(1)'s

"equal terms" provision as imposing strict liability, viewing that provision as negating any requirement that a plaintiff prove any burden on religious rights. The court wrote: "§ (b)(1) renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority." App. A-25a.

The court also rejected use of the rational basis standard of *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), which is typically used in equal protection cases when two "similarly-situated" land uses are treated differently. *Id.* Its decision interpreted Section (b)(1) as requiring only an analysis of whether two uses fall into the "natural perimeter" of "an assembly or institution," and not whether the two land uses are similar to each other in relevant zoning aspects. App. A-27a-28a.

Finally, the circuit court ruled that RLUIPA did not violate the Establishment Clause by giving special deference to religious uses over non-religious uses. App. A-48a-53a. It also ruled that Congress did not exceed its authority under the Tenth Amendment and Section 5 of the Fourteenth Amendment by enacting RLUIPA. App. A-42a-48a, 53a-55a. Surfside unsuccessfully sought rehearing and rehearing *en banc*. App. J-162a.

REASONS FOR GRANTING *CERTIORARI*

I. The Decision Below Presents an Important But Unanswered Federal Question Regarding Congress's Constitutional Authority to Federalize Local Land Use and Zoning Laws, and Enact Legislation That Substantively Alters, or Abrogates, Established Equal Protection and Free Exercise Laws.

The decision below will substantially affect neutral zoning laws throughout the nation. The decision bolsters Congress's attempt to substantially alter decades of free exercise and equal protection precedent, holding that Section (b)(1) of RLUIPA *per se* compels local governments to allow houses of worship to locate anywhere any group of persons is permitted to gather, without regard to government justification and contrary to the historical deference accorded to local government zoning decisions. Certiorari should be granted to resolve the important question of the scope of Congress's power to enact RLUIPA and the circuit court's imposition of an unprecedented strict liability standard on local governments for "equal terms" violations.

A. RLUIPA substantively alters established equal protection laws and is unconstitutional.

For RLUIPA to be constitutional, it must codify existing constitutional principles without substantively altering them. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In equal protection challenges to zoning laws, this Court has held that a court must find that the land uses being compared be "similarly situated" with each other in all relevant aspects, and if they are, and are being treated differently, then there must be a rational basis supporting the differing treatment.

See Cleburne, 473 U.S. at 439, 447-50. Where religious uses are involved, only zoning laws that are not "neutral and of general applicability" need to be justified by a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). A zoning law is not "neutral" or "generally applicable" if its purpose is to infringe upon or restrict practices because of their religious motivation, or if the government decides that its interests it seeks to advance are "worthy of being pursued only against conduct with a religious motivation." *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-879 (1990); *Lukumi*, 508 U.S. at 542-43.[1] Pre-*Midrash*, an incidental effect had never been synonymous with "purpose to infringe," and a restriction of location or preference was never equated with a restriction on religious practice. *See, e.g., American Communications Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 397-98 (1950) (noting the dismissal for lack of substantiality *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville*, 338 U.S. 805 (1949), in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas).

The decision below recognized that RLUIPA abrogates the "similarly-situated" and "rational basis" analyses under *Cleburne* and *Smith*. The court interpreted section (b)(1) of RLUIPA as requiring only an analysis of whether two land uses fall into the "natural perimeter" of "an assembly or institution," not whether the two land uses are similar to each other in all relevant zoning aspects. If the religious and non-

1. The district court found that the synagogues presented no evidence that the ordinances were enacted with any *Lukumi* animus or a purpose hostile to religion. App. H-112a; I-141a-145a.

religious assemblies are being treated differently, the circuit court held that that alone established the "targeting" of religion and discrimination sufficient to trigger the heightened standard under *Lukumi*. The decision below goes beyond *Lukumi*'s compelling interest exemption by allowing no exceptions and imposing a *per se* rule.

The decision's standard for establishing "similarly-situated" uses under RLUIPA does not take into account the myriad differences in assemblies and institutions that affect zoning decisions (*e.g.*, commercial vs. non-commercial uses, public vs. private uses). Under the decision's expansive definition of "assembly," religious institutions are similarly situated to every land use where people may gather (including nightclubs, restaurants, sports stadiums, arenas, parks, and bars, or informal gatherings such as Girl Scout meetings, tupperware parties and poker games in private homes). That view is unprecedented and unwarranted and presents an important question. If Congress established an equal protection test different than that prescribed by the Court, it would be beyond the scope of Congress' authority. *See City of Boerne*, 521 U.S. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary").

B. Congress lacked the power to enact RLUIPA.

RLUIPA as interpreted and applied below, constitutes a gross legislative usurpation of the judicial function to decide whether there has been violation of constitutional rights, and a denigration of the uniquely local government function of land use planning. As the Court has stated, "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local

legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508, n.18 (1975). *See also Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity").

Congress's power to intrude into this distinctly local function must be based on either section 5 of the Fourteenth Amendment or the Commerce Clause. There is no adequate legislative record that supports the notion that local land use and zoning laws, which, like here, permit religious institutions to be constructed and operate, interfere with interstate commerce, or that in this case there is any substantial burden affecting interstate commerce. Therefore the only *raison d'etre* for RLUIPA is section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

This Court has already found that a prior attempt by Congress to enact the similar Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"), was unconstitutional. *See City of Boerne*, 521 U.S. at 535. The Court's criticism of RFRA applies with the same force to RLUIPA:

> This is a considerable congressional intrusion into the State's traditional prerogatives and general authority to regulate for the health and welfare of their citizens. The substantial costs RFRA exacts, both in terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional

> conduct under the Free Exercise clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

Id. at 534-35. The Court found that RFRA contradicted "vital principles necessary to maintain separation of powers and the federal balance," and declared it to be unconstitutional. *Id.* at 536.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), adds force to the argument that RLUIPA is unconstitutional. The question in *Garrett* was whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the Americans with Disabilities Act of 1990. The Court wrote:

> *City of Boerne* also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. 521 U.S., at 519-524, 117 S. Ct. 2157. Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S. Ct. 2157.

Garrett, 531 U.S. at 365.

In striking RFRA, the Court held that "that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only 'anecdotal evidence' that, standing alone, did not reveal a "widespread pattern of religious discrimination in this country. . . ." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82 (2000), *citing City of Boerne*, 521 U.S. 507, 531. It also "found that RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

RLUIPA, like RFRA, is not remedial, preventive legislation. RLUIPA suffers from the same lack of widespread evidence of discrimination in the zoning context. Despite Congress' self-serving statement that "the General Rules in § 2(a)(1), and the specific provisions in § (2)(b), are proportionate and congruent responses to the problems documented in this factual record," *see* 146 Cong. Rec. S7774-01, S7775, that "factual record" does not carry the weight demanded by this Court.

The anecdotal record made at the nine congressional hearings does not illustrate constitutional violations or "widespread and persisting" constitutional violations

by the states.[2] A 1998 national study of congregations by independent sociologists that was cited at the hearings – and which is the only nationwide and comprehensive survey of congregations ever done — found no pattern of discrimination against religious institutions by local governments, and showed that religious landowners rarely had to litigate in the land use process. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 344 (2003). The study showed that only one percent of religious institutions seeking a permit or license were denied. *Id.* at 351.

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2. The testimony has been described as falling into five categories: (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) multiple references to garden variety zoning laws applied to churches; and (5) private, rather than governmental, expression that does not implicate constitutional violations. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 344 (2003). Professor Hamilton noted that,

> the House Report attempts to meet its burden through an adjective, summarizing this evidence as 'massive,' but it is not even close to significant on the question of whether local and state governments persistently violate constitutional principles in the application of the thousands of land use laws routinely applied to millions of citizens, including religious landowners, every year.

Id. Indeed, no land use expert was asked to testify at the hearings to explain the potential impact of RLUIPA in the field. None of the local and state government organizations were asked to testify, despite their significant and vehement opposition to RLUIPA. *Id.* at 331.

Whether RLUIPA is legislation "broader than is appropriate if the goal is to prevent and remedy constitutional violations," *City of Boerne*, 521 U.S. at 532, is an important question that should be answered by this Court. In *Boerne*, the Court said:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

Id. at 535. Location has never been a basis for according religious preferences. *See, e.g., Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakeland*, 699 F.2d 303, 307 (9th Cir. 1983) ("building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs"); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988) (holding that constructing a church in a district not zoned for such use is not intimately related to the religious tenets of the church); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("the impact [on zoning houses of worship] is not upon the content of religious practices but only upon where that religion may be practiced"). *See also Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 766 (7th Cir. 2003).

The Tenth Amendment protects the Framers' commitment to dual sovereignty. *See Printz v. United States*, 521 U.S. 898, 918-19 (1997); *New York v. United States*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). Whether Congress' attempt to go beyond the Constitution — to commandeer local governments to surrender their land use laws to a federal statutory standard — violates the Tenth Amendment is a question for this Court. *See Boerne*, 521 U.S. at 519 ("Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is").

C. RLUIPA violates the Establishment Clause.

RLUIPA may also violate the Establishment Cause. Because there is a potential for an "assembly" of people in every zoning district, religious institutions could dictate where they may locate by merely pointing to any group of people who may gather in that location, effectively immunizing themselves from zoning altogether. RLUIPA's special deference to religious land uses provides "a federal statutory entitlement to an exemption from a generally applicable, neutral civil law," giving religious organizations "a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring), *citing Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

RLUIPA's "equal terms" provision makes no pretense about its preference for, and deference to, religion. A large

religious edifice could demand entry into a carefully zoned area simply because a small ballet school, club, or similar nonreligious assembly or institution lawfully operates within the zoned district. In a one-square-mile town like Surfside, with a small two-block business district, the presence of a single business district café would require that a town allow the balance of its commercial district to be used — if not consumed — by religious assemblies or institutions upon their demand. *Compare Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 ("At some point, accommodation may devolve into an unlawful fostering of religion. . . .").

D. The view that a plaintiff can prove an "equal terms" violation without proving a substantial burden is contrary to the express provisions of RLUIPA and free exercise law.

The court below held that a plaintiff need not prove a substantial burden on religious exercise to establish an "equal terms" violation under Section (b)(1) of RLUIPA. That contravenes the express terms of RLUIPA and its legislative history. As set forth in the "General rule" of Section (a) of RLUIPA, before a violation can be found, religious institutions must prove that a zoning law substantially burdens religious exercise. *See* 42 U.S.C.A. § 2000cc-1(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person. . . ."). As Congress explained, "This so-called jurisdictional element *must be proved in each case* as an element of the cause of action." H.R. Rep. No. 106-219, at 28 (emphasis added). *See also* 146 Cong. Rec *S7776 ("Sections [(b)(1) and (2)] . . . enforce the Free Exercise Clause rule against laws that burden

religion and are not neutral and generally applicable"); *id.* at *S7776 ("[T]he party asserting a violation of this Act shall *in all cases* bear the burden of proof that the government action in question constitutes a substantial burden on religious exercise") (emphasis added); *id.* at *S7775-76 (Section (a) is a "general rule" followed by "specific provisions").

Applying the statutory construction principle to read statutes as a whole, Section (a)'s threshold jurisdictional requirement for a Section (b)(1) violation makes sense because general provisions of RLUIPA suggest that the substantial burden requirement applies to any violation under the entire chapter. For example, RLUIPA's "Burden of Persuasion" applies to "violation[s] of section 2000cc of this title" (which includes both Sections (a) and (b)), and states "that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." 42 U.S.C.A. § 2000cc-2(b). RLUIPA's preemptive force provision, "Governmental discretion in alleviating burdens on religious exercise," also applies to "any provision of this chapter" and provides that the government may avoid the preemptive force by changing the policy or practice that substantially burdens religious exercise. 42 U.S.C.A. § 2000cc-3(e).

A violation of Section (b)(1)'s "equal terms" provision naturally and expressly falls under Section (a)'s prohibition of substantially burdening religious exercise. The lower court's refusal to impose that threshold requirement broadens RLUIPA to protect religious institutions which would have no cause of action because they were not substantially burdened, thus taking RLUIPA beyond that which is necessary

to remedy purported constitutional violations. *See City of Boerne*, 521 U.S. at 520. This Court should determine whether the circuit court's decision to discard RLUIPA's substantial burden element was correct.

II. Conflict Between the Sixth and Eleventh Circuits on the Constitutionality of RLUIPA Warrants *Certiorari* Review by this Court.

A petition for writ of *certiorari* is pending seeking review of *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (Case No. 03-9877), relating to the enforceability of RLUIPA and its provisions applicable to institutionalized persons. *See* 42 U.S.C. § 2000cc-1. Although the instant case relates to RLUIPA's land use provisions, the land use and the institutionalized persons provisions are rooted in the same premise — to negate the effect of *Smith* and *City of Boerne*, and to reinstate the compelling interest test even as to neutral laws of general applicability.

In *Cutter*, the prisoners claim that Ohio prison regulations denying them access to religious literature and the opportunity to conduct religious services violates RLUIPA. The *Cutter* court held RLUIPA violated the Establishment Clause and was an improper exercise of Congress's legislative authority under the Commerce Clause and § 5 of the Fourteenth Amendment. 349 F.3d at 267 ("[R]LUIPA extends protection to religious exercise . . . far beyond what is required by the Establishment Clause; it imposes strict scrutiny where the Establishment Clause requires only a rational-relationship review."). The Eleventh Circuit came to a contrary conclusion. *Certiorari* should be granted to resolve the conflict.[3]

3. We note that *Bass v. Madison*, No. 03-1404, is pending seeking review of the Fourth Circuit decision in *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), which also conflicts with *Cutter*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 21, 2004

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-13858

D.C. Docket No. 99-01566-CV-UUB

MIDRASH SEPHARDI, INC., YOUNG ISRAEL OF BAL HARBOR, INC.,

Plaintiffs-Counter-Defendants-Appellants,

v.

TOWN OF SURFSIDE, a Florida Municipal Corporation,

Defendant-Counter-Claimant-Appellee,

PAUL NOVACK, Individually and in his capacity as Mayor of the Town of Surfside, et al.,

Defendants.

Appeals from the United States District Court for the Southern District of Florida

(April 21, 2004)

Appendix A

Before WILSON and KRAVITCH, Circuit Judges, and GOLDBERG*, Judge.

WILSON, Circuit Judge:

Young Israel of Bal Harbour ("Young Israel") and Midrash Sephardi ("Midrash"), two synagogues serving the Surfside-Bal Harbour-Bay Harbor Islands area of Miami-Dade County, Florida, appeal the district court's entry of summary judgment in favor of the Town of Surfside ("Surfside") on the synagogues' claims challenging the Surfside Zoning Ordinance ("SZO") under the Religious Land Use and Institutionalized Persons Act ("RLUIPA" or the "Act"), 42 U.S.C. § 2000cc *et seq.*[1] We first hold that the SZO's provision excluding churches and synagogues from locations where private clubs and lodges are permitted violates the equal terms provision of RLUIPA. Consequently, we must decide whether RLUIPA is a constitutional exercise of Congress's authority under the First, Tenth, and Fourteenth Amendments. Finding that it is, we reverse the decision of the district court.

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

1. The plaintiffs also contend that the SZO violates their rights under the First and Fourteenth Amendments, as well as their rights under the Florida Religious Freedom and Restoration Act. Because we sustain the congregations' RLUIPA challenge to the ordinance, we need not reach these additional claims.

Appendix A

Background

Surfside, a small coastal town north of the City of Miami Beach and south of Bal Harbour, Florida, comprises roughly one square mile and has approximately 4,300 residents and an additional estimated tourist population of 2,030. Midrash and Young Israel (collectively the "congregations") are small Orthodox Jewish synagogues that serve the Surfside area. Together they have over one hundred members who reside in or around Surfside; their attendance triples during the winter tourist months. In addition to Midrash and Young Israel, two churches and two other synagogues presently operate in Surfside.

I. The Challenged Ordinance

Chapter 90 of the Code of the Town of Surfside, Florida, (hereinafter "SZO § X") divides Surfside into eight zoning districts, identified in Article III of the SZO. Article IV of the SZO sets forth the specific regulations governing the applicable districts, and delineates permitted uses as of right, and uses permitted subject only to special use permit or prior conditional use approval. Surfside's zoning scheme is permissive: any use not specifically permitted is prohibited. *See* SZO § 90-6(1).

Under Article IV, churches and synagogues are prohibited in seven of the eight zoning districts. SZO permits churches and synagogues in the "RD-1 two-family residential district" ("RD-1 district") by way of conditional use permit ("CUP") obtained after approval by the Surfside Town Commission. SZO § 90- 147(d). The SZO requires a CUP because

conditional uses are "generally of a public or semipublic character . . . but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment...." SZO § 90-41(a). CUPs are also required for educational institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities. *See* SZO § 90-41(b)(1)-(5).[2]

Surfside's business district, which encompasses two blocks within the town, is defined by SZO § 90-152 "to provide for retail shopping and personal service needs of the town's residents and tourists." SZO § 90-152(a). Section 90-152 further states that regulations governing the business district are "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.* Theaters and restaurants are permitted on the first floor level of the business district, while private clubs and lodge halls, health clubs, dance studios, music instruction studios, modeling schools, language schools, and schools of

2. The standards and procedures for conditional use approval are set forth in SZO § 90-41, which provides that conditional use approval shall only be granted "where it has been clearly shown that the public health, safety, morals, and general welfare will not be adversely affected . . . and that necessary safeguards will be provided for the protection of surrounding property." SZO § 90-41(b). Section 90-41 further provides that "[t]he planning and zoning board's report to the town commission may contain recommendations regarding conditions which should be imposed by the town commission in approving the conditional use," and that "[t]he town commission may establish these and/or additional conditions for an approval." SZO § 90-41(d). The SZO does not articulate any other standards governing the CUP procedure.

athletic instruction are only permitted above the first floor. *See* SZO § 90-152(b)(8), (18). Although permitted, Surfside does not have private clubs, social clubs, lodges or theaters. Churches and synagogues are prohibited in the business district.[3]

II. The Litigants

Midrash was formed in 1995 and leases the second floor of 9592 Harding Avenue from Ohio Savings Bank ("OSB"). The Harding Avenue location is within Surfside's business district, on the south side of the 96th Street boundary between the towns of Bal Harbour and Surfside, three blocks away from Bay Harbor Islands. Midrash draws its membership from all three towns in the Surfside-Bal Harbour-Bay Harbor area.

Surfside denied a Midrash application for a special use permit, and denied Midrash's application for a zoning variance to operate in its current location because Midrash failed to provide written permission from OSB.[4] Midrash did

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3. Although other uses "having the same general characteristics and of such nature that the same would not lower the standards of the area" may be permitted in the business district by way of special use exception, churches and synagogues may not apply for special use exceptions because churches and synagogues are only permitted "in any district which they are *specifically* allowed." *Compare* SZO § 90-152(e) *with* SZO § 90- 41(b) (emphasis added).

4. Written permission from the owner is required for all applications for rezoning, including applications for variances, conditional uses, and special uses. *See* SZO § 90-58(6), (7).

not appeal either denial, nor did it seek OSB's permission to re-apply for either a special use permit or a variance.[5]

In March 1999, Young Israel began leasing space in the Coronado Hotel, located in Surfside's tourist district, one block south of the 96th Street boundary between the towns of Bal Harbour and Surfside and several blocks away from Bay Harbor Islands. In November 2000, the Coronado Hotel was sold, and as a result, Young Israel congregants joined temporarily with Midrash congregants in Midrash's Harding Avenue location. Like Midrash, Young Israel draws its membership from all three towns in the Surfside-Bal Harbour-Bay Harbor area. Young Israel has never attempted to obtain a CUP or a variance. Both congregations maintain that any attempt to relocate in the permitted RD-1 district would be futile because suitable land is unavailable.

The members of Midrash and Young Israel adhere to the strict observance of Orthodox Judaism. Synagogue services include religious prayer, worship, song, Torah readings, sermons, group discussions, required Sabbath and holiday festivities, celebrations of religious events and religious study. A central tenet of Orthodox Jewish faith requires daily

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5. Section 90-91 provides that the town commission may grant approval for special exceptions, special use permits or variances "after having received a report and recommendation of the planning and zoning board." SZO § 90-91(a). "Special exceptions or variances shall only be granted in cases of demonstrable and exceptional hardship as distinguished from purposes or reasons of convenience, profit or caprice." SZO § 90- 91(b). Neither party argues that the synagogues have shown, or indeed could show, the requisite hardship in order to obtain special exceptions or variances.

prayers and the presence of a "minyan"—a quorum of ten males over the age of thirteen—for the reading from the Torah on the weekly Sabbath and religious holidays. According to the synagogues, they have hosted weddings, Bar-Mitzvahs, Brit-Milahs, community holiday meals and festivities, lectures and group discussions on social and political issues, meetings on community welfare and public service activities, and singles events, all within the context of their religious and spiritual missions.

Orthodox Judaism forbids adherents to use cars or other means of transportation during the weekly Sabbath and religious holidays; thus, adherents prefer to gather for worship and religious study in synagogues close enough to their homes to allow them to walk to services.[6] To this end, the congregations claim that the RD-1 district is out of the required walking range for a significant number of their members, particularly elderly ones, who reside on the northern side of Surfside and in the neighboring Bal Harbour and Bay Harbor communities.

Surfside claims that the SZO was designed in part to invigorate the business district and to create a strong tax base through its retail district.[7] The economic viability of the

6. Surfside argues that Jewish law permits the elderly and persons with medical conditions to use transportation to attend services, and thus that walking is not a *per se* requirement of Orthodox Judaism. It is worth noting at this point that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989).

7. Surfside cites the 1995-2000 Comprehensive Plan, adopted pursuant to Local Government Comprehensive Planning and Land

(Cont'd)

business district—the only retail service area in Surfside—is critical to Surfside's tax base, job base, and servicing the needs of Surfside's residents. Accordingly, Surfside avers that allowing churches and synagogues in the business district

(Cont'd)

Development Regulation Act, Fla. Stat. Ann. § 163.3161 *et seq.* The 1995-2000 Plan states that Surfside's primary goal in drafting the SZO is to "[e]nsure that the character and location of future land uses directs growth in such a way so as to provide maximum economic benefit" to Surfside. Thus, under the 1995-2000 Plan, Surfside encourages, *inter alia,* 1) revitalization of the existing Harding Avenue business area; 2) concentration of commercial uses in and around Harding Avenue; 3) development of commercial office space along Collins Avenue between 93rd and 96th Streets to provide a greater population for retail and service shops along Harding Avenue; and 4) development of commercial uses along 94th, 95th, and 96th Streets between Collins and Harding Avenues.

The 2010 Comprehensive Plan states, *inter alia,* that Surfside's objectives are to 1) encourage private investment in the revitalization of the Harding Avenue business district; 2) maintain and improve zoning regulations which permit the concentration of commercial uses in and around the established Harding Avenue business area; and 3) maintain and improve zoning regulations which permit commercial office space along Collins Avenue as part of mixed use developments which provide concentrations of workers and/or residents to support retail and service uses along Harding Avenue.

We have said that "Florida's land use planning statutes provide for the adoption of comprehensive plans to control and direct the use and development of property within a county or municipality. Once a comprehensive plan for an area is adopted, all development approved by a governmental agency must be consistent with the plan." *Eide v. Sarasota County,* 908 F.2d 716, 718-19 (11th Cir.1990) (citations omitted).

would erode Surfside's tax base, on which Surfside is dependent for revenue, and would result in economic hardship on the residents. Because Surfside has a difficult time competing for business with the nearby Shops at Bal Harbour—and recently lost a major retail supermarket chain—Surfside claims that it cannot afford to place non-economic establishments in the business district without risking the economic stability of Surfside.

Surfside allows private clubs and similar places of assemblage in the business district because it believes such organizations are compatible with the retail character of the business district. Surfside contends that private clubs are entertainment centers and typically occupy retail space in commercial districts where revitalization is required. Surfside argues that churches and synagogues, on the other hand, contribute little synergy to retail shopping areas and disrupt the continuity of retail environments.

III. Procedural History

In May 1999, Surfside initiated two actions against the congregations and their respective lessors in state court to enjoin the use of the Harding Avenue site and the Coronado Hotel as synagogues and to impose civil penalties for alleged violations of the SZO. The actions were removed to federal court and dismissed without prejudice. In July 1999, the congregations filed the instant action seeking declaratory and injunctive relief under 42 U.S.C. § 1983.[8] Surfside answered

8. The synagogues' original complaint alleged a facial equal protection violation, which was replaced in the second amended (Cont'd)

and filed a two-count counterclaim seeking declaratory and injunctive relief, as well as civil penalties and attorneys' fees.

Both parties moved for summary judgment. Surfside submitted evidence from land use experts on the economic viability of a small business district, who asserted that allowing churches and synagogues in the business district would erode Surfside's tax base. The congregations attempted to rebut this evidence by submitting affidavits from rabbis and congregants relating to the use and impact of the synagogues and the likely burden should the synagogues be required to relocate. The district court granted summary judgment for Surfside on five of six counts of the congregations' complaint and denied summary judgment in full for the congregations.

In November 2000, the congregations filed a third amended complaint alleging an additional claim based on RLUIPA. The district court granted summary judgment in favor of Surfside on all aspects of the congregants' RLUIPA claim and subsequently granted Surfside's counterclaim for an injunction.

(Cont'd)

complaint with an as-applied equal protection claim. Upon reviewing the record, we find that the synagogues abandoned their facial equal protection claim. The district court was not presented with and did not resolve an equal protection argument based on Surfside's treatment of private clubs and lodges. Therefore, we will not consider this argument on appeal. *See Walker v. Jones,* 10 F.3d 1569, 1572 (11th Cir.1994). To the extent that the argument overlaps with the synagogues' RLUIPA claim, we discuss that issue *infra*.

We issued a stay of injunction pending appeal. Pursuant to 28 U.S.C. § 2403(a), the United States has intervened to defend the constitutionality of RLUIPA.

Standard of Review

We review a grant of summary judgment *de novo,* applying the same legal standards that bind the district court. *See Cast Steel Prods., Inc. v. Admiral Ins. Co.,* 348 F.3d 1298, 1301 (11th Cir.2003). The construction and constitutionality of a statute are questions of law that we review *de novo. See Ranch House, Inc. v. Amerson,* 238 F.3d 1273, 1277 (11th Cir.2001).

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see also Morisky v. Broward County,* 80 F.3d 445, 447 (11th Cir.1996). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *See Cast Steel,* 348 F.3d at 1301.

Appendix A

Discussion

I. Justiciability

As an initial matter, we must address whether the congregations have standing to bring their claims and, with respect to their claim challenging the CUP procedure, whether that claim is ripe.

Both ripeness and standing are doctrines relating to the justiciability of the congregations' claims, which encompasses both constitutional and prudential concerns. *See Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 759 (11th Cir.1991). The constitutional aspect of justiciability focuses on whether the Article III requirements of actual "case or controversy" are met, while the prudential aspect asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time. *See id.* at 759-60.

Article III of the United States Constitution limits the power of federal courts to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. "This case-or-controversy doctrine fundamentally limits the power of federal courts in our system of government, and helps to 'identify those disputes which are appropriately resolved through judicial process.' " *Ga. State Conference of NAACP Branches v. Cox,* 183 F.3d 1259, 1262 (11th Cir.1999) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)).

The most significant doctrine of case-or-controversy is the requirement of standing. *Id.* "In essence the question of

standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). A party seeking to invoke federal jurisdiction must demonstrate: 1) an injury in fact or an invasion of a legally protected interest; 2) a direct causal relationship between the injury and the challenged action; and 3) a likelihood of redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *see also Pittman v. Cole,* 267 F.3d 1269, 1282-85 (11th Cir.2001). In evaluating whether a party has standing, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth,* 422 U.S. at 501.

Surfside argues that the congregations lack standing to assert that the SZO violates their constitutional rights because neither Midrash nor Young Israel has attempted to locate property in the RD-1 district, nor has either synagogue applied for a CUP or received OSB's permission to do so. Surfside's argument misses the point of the congregations' contention: even if a "suitable property" existed in RD-1 district, the congregations believe they have a legal right to remain in the business district.

Surfside has already sought to enforce § 90-152 against the congregations in an earlier state court action. In the instant action, Surfside seeks an injunction prohibiting the congregations from continuing at their current location, as well as an imposition of civil penalties. As a result of Surfside's attempts to enforce the provisions of § 90-152 against them, the congregations have suffered the requisite injury for standing purposes. We find that the congregations

have standing to challenge the application of business district regulations outlined in SZO § 90-152.[9]

The congregations also seek to challenge the CUP requirement and procedure found in SZO § 90-41. The district court determined that the synagogues lacked standing to contest the constitutionality of § 90-41 because by failing to follow procedures for obtaining a CUP, the congregations had not suffered an injury because of the application of § 90-41. Midrash nevertheless contends that it has standing to challenge the CUP because of the likelihood that Surfside will enforce the provision against it in the future. Section 90- 41 requires a CUP for churches and synagogues "in any district in which they are specifically allowed." Reading § 90-41 *in pari matera* with § 90-152, the congregations, if victorious, must apply for a CUP to continue operating at their current location. Assuming the correctness of the congregations' challenge to the validity of § 90-152 under RLUIPA, the congregations argue that any declaratory or injunctive relief invalidating § 90-152 would be incomplete if their challenge to § 90-41 were not considered as well.

The congregations' CUP challenge implicates the doctrine of ripeness, which, like the standing doctrine, involves consideration of both constitutional and prudential concerns. *See Pittman,* 267 F.3d at 1278. The purpose of the

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9. However, we find that neither Midrash nor Young Israel has standing to challenge the application of § 90-151, which defines Surfside's tourist district and, like § 90-152, permits private clubs but excludes churches and synagogues. *See* 90-151(b)(2). Neither party is located in the tourist district, and neither party has concrete and specific plans to locate in there.

ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . ." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99 (1977). In deciding whether a claim is ripe for adjudication or review, we look primarily at two considerations: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties of withholding court consideration. *Id.* at 149.

The congregations' CUP challenge fails the prudential, or "fitness," prong of the ripeness inquiry. Because the congregations have not received a final decision on a CUP application—indeed, neither party has seriously applied for a CUP—the congregations do not raise a purely legal issue which we can decide in the abstract without further factual development. *Cf. id.* Instead, the congregations' allegations amount to mere speculation about contingent future events. We cannot determine from the record how the CUP will be applied and whether Surfside will use the CUP process to deny the plaintiffs permits to operate their synagogues. The record contains no significant evidence of Surfside's having denied CUPs in the past, and thus, the impact of the CUP requirement is not sufficiently direct and immediate as to render the issue appropriate for judicial review. Such inquiry is better postponed until the issues are presented in the more concrete circumstance of a challenge to § 90-41 as applied.

We turn to the plaintiff's challenge to SZO § 90-152 under RLUIPA.

Appendix A

II. RLUIPA

Two operative subsections of RLUIPA are at issue in this case: § (a) (the "substantial burden provision"), and § (b)(1) (the "equal terms provision"). We address each of these sections in turn.

A. Substantial Burden on Religious Exercise

Section (a)(1) of RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

Section (a)(1) applies only if one of three jurisdictional tests is first met: either (A) the burden is imposed in a federally-funded program or activity; (B) the burden affects, or removal of the burden would affect, interstate commerce;

or (C) the "burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). "Land use regulation" is defined as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has . . . [a] leasehold . . . in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5).

Jurisdiction in this case is appropriate under RLUIPA's "individualized assessment" test. *See id.* at § 2000cc(a)(2)(C). The SZO requires each church and synagogue to apply for a CUP prior to operating in Surfside. This assessment procedure, which results in a case-by-case evaluation of the proposed activity of religious organizations, carries the concomitant risk of idiosyncratic application of SZO standards. Surfside officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways. Thus, SZO is quintessentially an "individual assessment" regime vis-a-vis churches and synagogues.

The general rule of RLUIPA is that state action substantially burdening "religious exercise" must be justified as the least restrictive means of furthering a compelling governmental interest. *Id.* at §§ 2000cc(a)(1), 2000cc-1(a). To invoke the protection of § (a) of RLUIPA, plaintiffs bear the burden of first demonstrating that the regulation substantially burdens religious exercise. *See id.* at § 2000cc-2(b). Because the alleged burden is imposed as a result of

SZO, we first consider whether "religious exercise" is implicated by either the SZO or its implementation.

1. Religious Exercise

Past cases have held that zoning decisions do not generally impose a substantial burden on religious exercise. *See Grosz v. City of Miami Beach,* 721 F.2d 729, 739 (11th Cir.1983); *see also Christian Gospel Church, Inc. v. City and County of San Francisco,* 896 F.2d 1221, 1224 (9th Cir.1990); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824-25 (10th Cir.1988); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 306-07 (6th Cir.1983). These cases all considered whether the "religious exercise" implicated by zoning decisions was integral to a believer's faith. RLUIPA obviates the need for such analysis by providing a statutory definition of "religious exercise."

Under RLUIPA, "religious exercise" includes the "use, building, or conversion of real property for the purpose of religious exercise. . . ." 42 U.S.C. § 2000cc5(7)(B). Unlike the suggestions made in the cases cited above, "religious exercise" does not have to be "compelled by, or central to, a system of religious belief." *Id.* at § 2000cc-5(7)(A). In passing RLUIPA, Congress recognized that places of assembly are needed to facilitate religious practice, as well as the possibility that local governments may use zoning regulations to prevent religious groups from using land for such purposes. Thus, challenges to zoning ordinances are expressly contemplated by the statute, and there is no doubt that the congregations' challenge concerns "religious exercise" within

the meaning of RLUIPA. Therefore, the question then becomes whether the challenged zoning regulations, or the application thereof, effect a "substantial burden" on the congregations' use of real property for the purpose of religious exercise. We turn to this question.

2. Substantial Burden

Any exercise of statutory interpretation begins first with the language of the statute in question. *See Nat'l Coal Ass'n v. Chater,* 81 F.3d 1077, 1081 (11th Cir.1996). Because RLUIPA does not define "substantial burden," we give the term its ordinary or natural meaning. *See id.* Although the legislative history of a statute is relevant to the process of statutory interpretation, "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States,* 510 U.S. 135, 147-48 (1994). We turn, therefore, to other instances in which courts have defined or discussed the term "substantial burden."

The Supreme Court's definition of "substantial burden" within its free exercise cases is instructive in determining what Congress understood "substantial burden" to mean in RLUIPA. The Court's articulation of what constitutes a "substantial burden" has varied over time. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450 (1988) (indicating that no substantial burden exists where regulation does not have "a tendency to coerce individuals into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141 (1987) (finding substantial burden when government put "substantial pressure on an adherent to modify his behavior

and to violate his beliefs"); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (same); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) (finding a substantial burden when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other"); *but see Bowen v. Roy,* 476 U.S. 693, 707-08 (1986) (finding no substantial burden where government action interfered with, but did not coerce, an individual's religious beliefs); *Lyng,* 485 U.S. at 452 (same).

We have held that an individual's exercise of religion is "substantially burdened" if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion. *See Cheffer v. Reno,* 55 F.3d 1517, 1522 (11th Cir.1995) (applying the Religious Freedom Restoration Act, we found no substantial burden when religion did not require particular means of expressing religious view and alternative means of religious expression were available); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1550 (11th Cir.1993) (finding a substantial burden when regulation had the effect of mandating religious conduct).

In interpreting the same provision of RLUIPA as we have before us today, the Seventh Circuit recently declared:

> in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and

> fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir.2003) (hereinafter "*CLUB*"). While we decline to adopt the Seventh Circuit's definition—which would render § b(3)'s total exclusion prohibition meaningless[10]—we agree that "substantial burden" requires something more than an incidental effect on religious exercise.

The combined import of these articulations leads us to the conclusion that a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

The congregations argue that requiring them to locate their synagogues in the RD-1 district constitutes a substantial burden for two related reasons. First, they contend that relocation would require their congregants to walk farther. Specifically, they suggest that the additional blocks would

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10. The "exclusions and limits" provision provides that "[n]o government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

greatly burden congregants who are ill, young or very old. The inconvenience occasioned on these congregants would cause them to stop attending services altogether, significantly impairing the synagogues' operation. As a result, the congregations suggest that the significant decrease in attendance would require them to cease operations altogether, thereby creating an obvious substantial burden on their religious exercise.[11]

Viewing the evidence in a light favorable to the congregations, we first note that they do not claim that their current location has some religious significance such that their faith requires a synagogue at this particular site.

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11. In addition to these burdens, the congregations suggest that they will not be able to find land or a facility sizable enough to accommodate their congregations in the permitted RD-1 district. That the congregations may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA. As the Seventh Circuit noted, "whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church v. City of Evanston,* 896 F.2d 1082, 1086 (7th Cir.1990).

The congregations also contend that the burden of requiring them to apply for a CUP constitutes a substantial burden on religious exercise. Requiring churches and synagogues to apply for CUPs allows the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking. We have found that such reasonable "run of the mill" zoning considerations do not constitute substantial burdens on religious exercise. *See Lady J. Lingerie, Inc. v. Jacksonville,* 176 F.3d 1358, 1362 (11th Cir.1999).

Appendix A

Although they are not permitted to locate in the business district, the congregations have the alternative of applying for a permit to operate only a few blocks from their current location. For purposes of evaluating whether the SZO exacts a substantial burden within the meaning of RLUIPA, the relevant inquiry is whether and to what extent this particular requirement burdens the congregations' religious exercise.

While walking may be burdensome and "walking farther" may be even more so, we cannot say that walking a few extra blocks is "substantial," as the term is used in RLUIPA, and as suggested by the Supreme Court. The permitted RD-1 district is in the geographic center of a relatively small municipality, proximate to the business, tourist and residential districts. Deposition testimony indicated that congregants wishing to practice Orthodox Judaism customarily move where synagogues are located and do not typically expect the synagogues to move closer to them. *See* Casper Dep. at 23-24. In any given congregation, some members will necessarily walk farther than others, and, inevitably, some congregants will have greater difficulty walking than others. While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not "substantial" within the meaning of RLUIPA.

Were we to adopt the synagogues' reasoning, it would be virtually impossible for a municipality to ensure that no individual will be burdened by the walk to a temple of choice. Municipalities that allow religious exemptions to alleviate even the small burden of walking a few extra blocks would

run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others.

Given the facts in this case, the SZO does not exact a "substantial" burden on the congregations' religious exercise. Because we cannot say that the SZO imposes a substantial burden on religious exercise, the congregations have failed to establish a *prima facie* case under § (a). We need not reach the question of whether Surfside can justify the burden created by articulating a compelling government interest, nor need we reach the constitutionality of § (a). We turn next to the second argument advanced by the congregations under RLUIPA: whether Surfside's favorable treatment of private clubs and lodges relative to churches and synagogues violates RLUIPA's equal terms provision.

B. Equal Terms

The congregations argue that the SZO violates § (b)(1) of RLUIPA, which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

The Seventh Circuit has stated that "the substantial burden [§ (a)] and nondiscrimination provisions [§ (b)] are operatively independent of one another." *CLUB*, 342 F.3d at 762. Indeed, the application of § (b)(1) occasions difficulties of statutory construction not encountered when addressing § (a)'s prohibition against substantial burdens on religious

exercise. First, § (b)(1) does not require the plaintiff to meet a threshold jurisdictional test similar to that articulated in § (a)(2). Second, while § (b)(1) has the "feel" of an equal protection law, it lacks the "similarly situated" requirement usually found in equal protection analysis. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985). Third, unlike § (a), § (b)(1) renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority. We address each problem in turn.

1. Jurisdictional Nexus

The plain terms and structure of RLUIPA indicate that the jurisdictional prerequisites included in § (a) and discussed above do not apply to § (b)'s prohibition on discrimination against and exclusion of religious institutions. First, § (a)(2) specifically enumerates three jurisdictional tests, at least one of which must be satisfied prior to § (a)(1)'s application, while § (b) is silent as to jurisdictional tests. Second, § (a)(2), by its terms, applies to "subsection" (a). *See* 42 U.S.C. § 2000cc(a)(2) ("This *subsection* applies in any case in which [listing jurisdictional tests].") (emphasis added). Finally, the jurisdiction limits relate to burdens imposed by a government—language which is consistent with § (a)(1)'s prohibition on imposing a substantial burden without justification. *See id.* at § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial *burden* on the religious exercise of a person . . . .") (emphasis added).

Appendix A

Congress included the three jurisdictional limitations in 42 U.S.C. § 2000cc(a)(2) to satisfy the Supreme Court's concerns regarding congressional authority to enact legislation protecting the free exercise of religion. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 534 (1997) (striking down the Religious Freedom Restoration Act because it was a "considerable congressional intrusion into the State's traditional prerogative and general authority to regulate"). It was Congress's belief that applying RLUIPA in these more limited situations will alleviate federalism concerns raised by earlier religious liberty legislation. *See* 146 CONG. REC. S7774-01, *S7775 (2000) (joint statement of Sens. Hatch and Kennedy on the Religious Land Use and Institutionalized Person Act of 2000) (hereinafter "Joint Statement").

As discussed above, the SZO imposes a system of individualized assessments within the meaning of 42 U.S.C. § 2000cc(a)(2)(C), which requires that the burden be "imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). RLUIPA's text and structure suggest that § (a)(2)'s threshold jurisdictional test does not apply to § (b)'s equal terms provision. While the application of a jurisdictional test to § (b) claims will provide fodder for future exercises in statutory interpretation, we do not reach this question. Because we find that the congregations allege conduct satisfying the third jurisdictional prong of § (a)(2), we do not reach the question of whether they are *required* to satisfy this jurisdictional test.

2. "Similarly Situated"

The parties assume that § (b) applies to assemblies and institutions that are similarly situated in all relevant respects. *See, e.g., Cleburne,* 473 U.S. at 439. Indeed, the district court adopted this familiar "similarly situated" test when evaluating the congregations' claims. The district court concluded that private clubs and other secular institutions are not similarly situated to churches and synagogues because "private clubs provid[e] more of a social setting [and] provide more synergy for the shopping district in keeping with the purpose of § 90-152," than churches and synagogues. *Midrash Sephardi v. Surfside,* No. 99-1566-CIV-Ungaro-Benages/Brown, at 17 (S.D.Fla. July 13, 2000) (order granting partial summary judgment). The district court also found that "churches, synagogues, educational or philanthropic museums (including museums), parking lots and garages, public and governmental buildings and public utility/public services uses are all Conditional uses . . . [which] . . . fall within Justice Harlan's natural perimeter test,[12] as this would apply to a group of secular and non-secular uses that 'are of a public or semi-public character.'" *Id.* (citing SZO § 90-41(a)).

Section (b)(1) makes it clear that the relevant "natural perimeter" for consideration with respect to RLUIPA's prohibition is the category of "assemblies or institutions." The district court erred by not considering RLUIPA's statutory

12. *See Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696 (Harlan, J., concurring) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

categorization as the relevant "perimeter." By adopting Surfside's conditional use definition[13] as the relevant "natural perimeter," the district court overlooked the express provisions of RLUIPA which require a direct and narrow focus. Under RLUIPA, we must first evaluate whether an entity qualifies as an "assembly or institution," as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution. *See* 42 U.S.C.2000cc(b)(1).

Because RLUIPA does not define "assembly" or "institution," we construe these terms in accordance with their ordinary or natural meanings. *See Nat'l Coal Ass'n,* 81 F.3d at 1081.

An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); or "[a] group of persons organized and united for some common purpose." BLACK'S LAW DICTIONARY 111 (7th ed.1999). An institution is "an established society or corporation: an establishment or foundation esp. of a public character," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 1171 (1993); or "[a]n

13. Conditional uses, which include churches, synagogues, educational institutions, museums, off-street parking lots and garages, public and governmental buildings, and public utilities are "generally of a public or semipublic character . . . but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment. . . ." SZO § 90-41(a).

established organization, esp. one of a public character. . . ." BLACK'S LAW DICTIONARY 801 (7th ed.1999).

The SZO does not define the terms "church" or "synagogue," but does group them with "place[s] of assembly." *See* SZO § 90-226(b) (adopting regulations related to parking spaces). According to the SZO, a private club is "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes,* but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90-2(20) (emphasis added).

The SZO's definition of private club comports with a natural and ordinary understanding of "assembly" as a group gathered for a common purpose. Like churches and synagogues, private clubs are places in which groups or individuals dedicated to similar purposes—whether social, educational, recreational, or otherwise—can meet together to pursue their interests. We conclude therefore that churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of "assembly or institution."[14] Finding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently.

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14. Indeed, the legislative history indicates that § (b)(1) was intended to apply in *precisely* the situation presented here. *See* Joint Statement, at *S7774 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

3. Violation of § (b)

As noted above, the text of SZO § 90-152, which permits private clubs and other secular assemblies, excludes religious assemblies from Surfside's business district. Because we have concluded that private clubs, churches and synagogues fall under the umbrella of "assembly or institution" as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.

4. Level of Scrutiny

The interested parties in this case disagree as to the applicable level of scrutiny a law violating § (b) must undergo. Surfside assumes that it may justify a violation of § (b) by demonstrating that the varying treatment of different assemblies is rationally related to a legitimate purpose advanced by Surfside—the so-called "rational basis" review. The congregations argue that the ordinance must undergo strict scrutiny: Surfside must demonstrate that its ordinance is narrowly tailored to advance a compelling interest. Finally, the United States submits that § (b)'s prohibition does not allow a defendant to escape liability by providing a "rational basis" or "compelling interest"—in effect, holding government strictly liable a violation of § (b).

To clarify our analysis of a § (b) violation, we examine the jurisprudential foundations for Congress's enactment of § (b).

Mindful of the Supreme Court's admonition that a government would inhibit free exercise rights "if it sought

to ban such acts of abstentions only when they are engaged in for religious reasons," *Employment Div., Dept. of Human Res. v. Smith,* 494 U.S. 872, 877 (1990), Congress enshrined similar non-discrimination principles in § (b)'s requirement that religious and nonreligious assemblies or institutions be treated equally. *See* Joint Statement, at *S7776 ("Sections [(b)(1) and (2)] ... enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable."); H.R. REP. No. 106-219, at 7 n.9 (1999).

Prior to *Smith,* the Supreme Court applied strict scrutiny to cases in which a government discriminated against religion or religious exercise. *See, e.g., Thomas,* 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). While *Smith* abrogated the application of strict scrutiny by emphasizing that such review would not apply to neutral laws of general applicability that incidentally burden religious exercise, *see id.* at 879, the Court indicated that the heightened standard of review would continue to apply where a law fails to similarly regulate secular and religious conduct implicating the same government interests. *See id.* at 886 n.3 ("[W]e strictly scrutinize governmental classifications based on religion.") (citations omitted). After *Smith,* it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny. *See id.* at 879.

Appendix A

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah presented an opportunity for the Supreme Court to elaborate upon what was meant by neutrality and general applicability. In examining a series of ordinances which had the effect of proscribing ritualistic animal sacrifice by adherents of the Santeria religion, the Court confirmed that the government violates Free Exercise rights when it selectively imposes burdens on religious conduct. 508 U.S. 520 (1993). Although the *Lukumi* Court found the city's proscription facially neutral, the Court nevertheless concluded that the ordinances violated principles of neutrality by improperly targeting the Santeria religion. *See id.* at 534. Recognizing that the ordinances were both underinclusive and overbroad, the Court concluded that they were not neutral, but rather "had as their object the suppression of religion." *Id.* at 542. The Court also found that the ordinances were not generally applicable because they pursued the city's interests only against conduct motivated by religious belief. *Id.* at 545. The Court then subjected the ordinances to strict scrutiny, striking them down after determining that they were not narrowly tailored to accomplish government's interests, nor were the governmental interests compelling. *See id.* at 546.

RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent. By requiring equal treatment of secular and religious assemblies, RLUIPA allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability. A zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets

the religious character of an assembly. Thus, a violation of § (b)'s equal treatment provision, consistent with the analysis employed in *Lukumi,* must undergo strict scrutiny. *Id.*

Indeed, a closer look at § 90-152 reveals that Surfside improperly targeted religious assemblies and violated Free Exercise requirements of neutrality and general applicability. While merely the mention of church or synagogue in a zoning code does not destroy a zoning code's neutrality, we must nevertheless be mindful of the potential for impermissible "religious gerrymanders," which may render a zoning code operatively non-neutral. *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696 (Harlan, J., concurring). As we have noted, the text of § 90-152 treats religious assemblies differently than secular assemblies by excluding religious assemblies from the business district, a factor that is enough to constitute a violation of § (b) of RLUIPA, and, as we discuss below, also indicates an infringement of the *Smith* principles of neutrality and general applicability. With respect to neutrality, the purpose and operation of the ordinance reveal an impermissible attempt to target religious assemblies.

The purpose and operation of Surfside's business district is "to provide for retail shopping and personal service needs of the town's residents and tourists." SZO § 90-152(a). The regulations governing the business district are "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.*

Religious institutions, Surfside argues, are open only once a week, usually on a day or at a time that other area businesses are closed. Surfside maintains that the "central use" of a religious institution is as a "single destination" where congregants fill a "spiritual need" and then, presumably, vacate the area. For these reasons, Surfside contends that churches and synagogues do not cater to or stimulate the shopping and retail needs of Surfside residents in a way that comports with the objectives of the business district. Private clubs, on the other hand, allegedly provide a more "social" setting and promote "synergy" with the shopping district because the nature of activity in a club or lodge is entertainment.[15]

The congregations provide evidence that they meet throughout the week for purposes other than religious services, including Torah classes and group discussion. They aver that they hold social and entertainment gatherings, albeit within the context of their religious and spiritual mission. The congregations submit evidence suggesting that members regularly patronize area shops before and after services and meetings. The evidence also demonstrates that the congregations themselves purchase food, paper, and other

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15. Surfside does not define "synergy" but the evidence suggests that Surfside's primary concern was encouraging an increase in consumer traffic in its business and tourist districts. While Surfside suggests that allowing churches and synagogues will erode its tax base and ultimately require a decrease in services offered by Surfside to its residents, it does not devote much time to this argument. As described below, § 90-152 is both over- and underinclusive with respect to Surfside's goal of synergy, no matter how that term is defined.

supplies from the businesses in the area. The presence of synagogues has also led to the opening of kosher food businesses in the area. This evidence indicates that § 90-152 is overinclusive with respect to Surfside's objectives of promoting retail activity and synergy because the synagogues contribute to the retail and commercial activity of the business district.

Our review of the record indicates that § 90-152 is also underinclusive for the interests Surfside seeks to advance. The SZO's definition of private clubs belies Surfside's argument that private clubs are "typical retail and service activities" by indicating that private clubs are organizations existing "for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90-2(20). Moreover, permitted private clubs include organizations that often meet weekly, monthly, or bi-monthly, and sometimes during non-business hours—hours of operation which fail to stimulate an increase in consumer traffic to the business district. Other than conclusory assertions that private clubs are more social than churches—assertions disputed by evidence submitted by the congregations—and that the increased sociability lends itself to increased patronage of local establishments, Surfside provides no evidence that private clubs and lodges *actually* contribute to the business district in a way appreciably different than religious institutions. Surfside's stated goal of retail synergy is pursued only against religious assemblies, but not other non-commercial assemblies, thus devaluing the religious reasons for assembling. Under *Lukumi,* this discriminatory treatment extinguishes an ordinance's neutrality. *See Lukumi,* 508 U.S. at 538.

As the evidence suggests, the synagogues are not incongruous with the stated objectives and purposes of the business district advanced by Surfside through the SZO. By prohibiting religious assemblies in Surfside's business district, § 90-152 improperly targeted religious assemblies for dissimilar treatment and is therefore, not neutral.[16]

We turn to the second Free Exercise requirement that a law burdening religious practice must be generally applicable. *Lukumi,* 508 U.S. at 542. Surfside argues that the SZO places restrictions not only on religious entities, but also on other organizations, including educational institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities.

Zoning laws inherently distinguish between uses and necessarily involve selection and categorization, often restricting religious assemblies to designated districts and frequently requiring that religious assemblies complete a conditional use application procedure. *See id.* at 542-43 ("All laws are selective to some extent . . . [but] inequality results when a legislature decides that the governmental

16. We reject Surfside's contention that the SZO is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion in enacting the SZO. Under *Lukumi,* it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation. *See id.* at 540-42 (Kennedy, J., concurring); *see also id.* at 558 (Scalia, J., concurring in part and concurring in judgment).

interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.").

Surfside's treatment of synagogues as categorically different because they have "[n]ever held a social, communal, public service or other community affair event which is *unrelated to [their] religious and spiritual mission or purpose* " clearly implicates the Supreme Court's requirement that governments should not treat secular motivations more favorably than religious motivations. *See generally id.; see also Smith,* 494 U.S. at 877. The operation of § 90-152 to exclude religious assemblies because of their spiritual mission is just one indication that Surfside improperly excluded religious assemblies because of their religiosity. Another indication is the underinclusiveness of § 90-152. *See Lukumi,* 508 U.S. at 542-45 (concluding that because the city's ordinances pursued the city's interests only against religious conduct, the ordinances were not generally applicable). The inclusion of private clubs in the business district, which operate for "social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business," *see* SZO § 90-2(20), is incompatible with Surfside's asserted goals of achieving maximum economic benefit and the concentration and development of commercial uses along Harding Avenue. *See* 1995-2000 Comprehensive Plan. Because private clubs do not serve Surfside's economic and commercial goals but are nevertheless permitted in the business district indicates that § 90-152 pursues Surfside's interests only against conduct motivated by religious belief.

Appendix A

Including private clubs and lodges as permitted uses in Surfside's business district, while simultaneously excluding religious assemblies, violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues. Surfside's failure to treat the analogous groups equally indicates that Surfside improperly targeted religious assemblies.

As demonstrated above, a violation of § (b)'s equal treatment provision indicates that the offending law also violates the *Smith* rule requiring neutrality and general applicability. Consistent with the analysis employed in *Lukumi,* a law violating § (b) must therefore undergo the most rigorous of scrutiny. *Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359, 366 (3d Cir.1999) (applying strict scrutiny to overturn regulation that "indicat[ed] that the [government] made a value judgment that secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not").

We turn to whether Surfside, through the implementation of the SZO, "advance[s] interests of the highest order" and is narrowly tailored in pursuit of those interests. *Lukumi,* 508 U.S. at 546. As we have discussed, SZO § 90-152 is overinclusive and underinclusive in substantial respects. The proffered interests of retail synergy are not pursued against analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that do not improperly distinguish between similar secular and religious assemblies.

Because § 90-152 treats religious institutions on less than equal terms with nonreligious institutions, § 90-152 is invalid under § (b)(1) of RLUIPA.[17] Finding that SZO § 90-152 is not narrowly tailored to Surfside's interest, we need not address whether this interest is of "the highest order." *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 232 (1987).

III. Constitutionality of RLUIPA

Surfside argues that if we find that the SZO violates RLUIPA, such a finding is not dispositive because RLUIPA is unconstitutional for three reasons: 1) RLUIPA exceeds Congress's power under § 5 of the Fourteenth Amendment; 2) RLUIPA establishes religion in violation of the First Amendment; and 3) Congress lacked authority to pass RLUIPA because RLUIPA infringes on state sovereignty under the Tenth Amendment. The district court did not

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17. This conclusion does not inhibit a zoning authority's right to adopt other reasonable "run of the mill" zoning regulations—such as those related to size, parking, safety and health concerns—even though such regulations may have the effect of distinguishing between assemblies or institutions. For example, Surfside may regulate the number of parking spaces required for each facility, *see* SZO § 90-226, or restrict the size of assemblies or institutions, as the SZO does by prohibiting them on the first floor of buildings in the business district. As long as restrictions or distinctions are unrelated to the religious characterization, RLUIPA is not implicated. *See also* Joint Statement, at *S7776 ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

address the constitutionality of RLUIPA, instead finding that the congregations did not allege conduct that would invoke its protections. After a brief review of RLUIPA's statutory and case law predecessors, we turn to Surfside's contentions, confining our analysis of RLUIPA's constitutionality to the provisions implicated by Surfside's conduct. We conclude that RLUIPA withstands our scrutiny and is a proper exercise of Congress's § 5 powers.

A. RLUIPA Background

In 1990, the Supreme Court decided *Smith*, which held that the Free Exercise Clause of the First Amendment does not exempt an individual from compliance with a valid and neutral law of general applicability merely because the law incidentally burdens religious conduct. *See Smith*, 494 U.S. at 879. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb *et seq.*). RFRA sought to rescind *Smith* and restore what some refer to as the pre-*Smith* standard: the "compelling interest/least restrictive means" test found in *Sherbert*, 374 U.S. at 407-09, and *Yoder*, 406 U.S. at 214-15.

Four years later, the Supreme Court struck down RFRA as it relates to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress may enforce constitutional rights pursuant to § 5 of the Fourteenth Amendment. However, in *Boerne*, the Supreme Court held that by enacting RFRA, Congress had exceeded that authority by *defining* rights instead of simply *enforcing* them. *Boerne*, 521 U.S. at 532. RLUIPA is a response to *Boerne*, becoming

the latest congressional effort to offer statutory protection to religious liberty. *See* H.R.Rep. No. 106-219, at 4 (commenting that "H.R. 1691 [RLUIPA's legislative predecessor] was introduced, in part, in response to the Supreme Court's partial invalidation of the Religious Freedom Restoration Act. . . .").

Congress sought, through RLUIPA, to protect religious land uses from discriminatory processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country. *See* Joint Statement, at *S7774-S7775. As indicated during nine hearings held before both houses of Congress, RLUIPA targets zoning codes which use individualized and discretionary processes to exclude churches, especially "new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues." *Id.* at *S7774. The legislative record contained statistical, anecdotal and testimonial evidence suggesting that discrimination is widespread and typically results in the exclusion of churches and synagogues even in places where theaters, meeting halls and other secular assemblies are permitted. *Id.* at *S7774. According to RLUIPA co-sponsors Senators Hatch and Kennedy:

> The hearing record compiled massive evidence that [the right to build, buy, or rent space for churches and synagogues] is frequently violated. Churches in general, and new, small or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.

Id. at *S7774.

RLUIPA features two primary means of addressing these perceived infringements on religious liberty. RLUIPA revives RFRA's substantial burden test, confining the reach of this test to land use regulations that first pass jurisdictional muster. RLUIPA also contains § (b), a wholly new provision directed at zoning codes that discriminate against, or among religious institutions or unreasonably limit religious institutions in a jurisdiction. *See* 42 U.S.C. § 2000cc(b). As discussed above, SZO § 90-152 violates § (b)(1) of RLUIPA.

B. Fourteenth Amendment

Surfside first argues that by enacting RLUIPA, Congress exceeded its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

The Supreme Court has characterized Congress's power under § 5 of the Fourteenth Amendment as "remedial." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). As the Court noted in *Boerne:*

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be,

> in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Boerne, 521 U.S. at 519.

Neither party disputes, nor is there reason to doubt, that RLUIPA purports to protect certain religious liberties guaranteed by the First Amendment. In determining whether RLUIPA is an appropriate exercise of Congress's § 5 power, we must first determine whether Congress has the authority to enact legislation to enforce the rights guaranteed by the First Amendment. *See Boerne*, 521 U.S. at 519. *Boerne* answered this question in the affirmative. *See id.; see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment").

The second inquiry under *Boerne* is whether RLUIPA "enforces" a constitutional right without substantively altering that right. *See id.* One way in which we determine whether § 5 legislation enforces a right is by evaluating whether the legislation is congruent and proportional to the injury to be prevented or remedied. *Id.* at 520. Under *Boerne*, preventative measures are more likely to withstand scrutiny if they prohibit actions that themselves have "a significant likelihood of being unconstitutional." *Id.* at 532. Thus, according to *Boerne*, if RLUIPA merely codifies existing constitutional principles, it is an acceptable use of Congress's § 5 remedial tool.[18]

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18. As discussed above, SZO § 90-152 violates § (b) of RLUIPA, which also indicates that § 90-152 is neither neutral nor (Cont'd)

When conducting this analysis, we accord "great weight to the decisions of Congress," *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102(1973), and give Congress "wide latitude" in enacting preventative or remedial measures. *Boerne*, 521 U.S. at 520. As Justice Frankfurter has noted, courts must give "due regard to the fact that [they are] not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress has specifically considered the question of the law's constitutionality. *See Rotsker v. Goldberg*, 453 U.S. 57, 64(1981).

The United States argues that RLUIPA is a reasonable means of protecting the non-discrimination principles embodied in the Free Exercise and the Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

A survey of Free Exercise cases indicates that government action that specifically targets religion or religious conduct for distinctive treatment can be an impermissible intrusion on an individual's free exercise rights. *See Lukumi*, 508 U.S. at 534 ("Official action that

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(Cont'd)
generally applicable. Because § 90-152 fails these two Free Exercise requirements, it has a "significant likelihood of being unconstitutional."

targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. . . . '[We] must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'") (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring)); *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating law that disqualified members of the clergy from holding certain public offices); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (invalidating law which discriminated among religious sects). In *Lukumi*, the Supreme Court reaffirmed the principle that free exercise rights must be protected against laws that selectively impose burdens on conduct motivated by religious belief. *See Lukumi*, 508 U.S. at 543; *see also Hobbie*, 480 U.S. at 146 (overturning state decision to withhold unemployment compensation to an employee who refused to work on her Sabbath as violative of Free Exercise rights); *FOP*, 170 F.3d at 366-67 (holding that a police department policy prohibiting beards but allowing a medical exemption violated the nondiscrimination principles of the Free Exercise Clause).

The Establishment Clause mandates equal treatment of religious and secular assemblies based on the converse theory: the government may not favor the religious over non-believers because such favoritism would amount to an impermissible establishment of religion. *See, e.g., Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes . . . to favor adherents of any sect or religious organization."). The Supreme Court has consistently disapproved of unequal treatment that elevates religion over secular interests. *See generally Texas Monthly, Inc. v. Bullock*,

489 U.S. 1 (1989) (striking down law exempting only religious publications from taxation); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down state-sponsored prayers); *see also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (stating that "civil power must be exercised in a manner neutral to religion"); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that Government may not "prefer[] those who believe in no religion over those who do believe"). This bar to unequal treatment is also the fundamental point of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that the Establishment Clause requires that the "principal or primary effect [of governmental action] must be one that neither advances nor inhibits religion." *Id.* at 612.

In short, the equal treatment required by the two Religion Clauses serves to protect individuals from encroachments on the right to freely engage in religious exercise, and offers protection from government action that impermissibly favors religion.

Finally, the Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. AMEND. XIV, § 1, cl. 4, which provides support for § (b) by "direct[ing] that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439.

In *Cleburne*, the Supreme Court reviewed a city's land use regulation that distinguished between homes for persons with mental disabilities from multiple dwellings, boarding and lodging houses, fraternity or sorority houses, and

dormitories. *Cleburne* held that the difference between a group home and these other uses was irrelevant unless the group home and its occupants "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id.* at 448. By employing an equal protection analysis to examine whether a law applies equally to similarly situated assemblies or institutions, courts can ferret out laws that are facially neutral but discriminate in fact. *See Lukumi,* 508 U.S. at 540.

We agree with Justice O'Connor's observation that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel,* 512 U.S. at 715 (O'Connor, J., concurring). On the face of RLUIPA's equal terms provision, the echoes of these constitutional principles are unmistakable. Simply put, to deny equal treatment to a church or a synagogue on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses.

Congress's power is certainly not without limits, but we find that Congress's findings regarding the widespread discrimination against religious institutions are plausible and provide a basis for concluding that RLUIPA remedies and prevents discriminatory land use regulations. *See United States v. Holmes,* 838 F.2d 1175, 1177 (11th Cir.1988) ("[W]here a statute does not discriminate on racial grounds

or against a suspect class, Congress'[s] judgment will be sustained in the absence of persuasive evidence that Congress had no reasonable basis for drawing the lines that it did."). RLUIPA tailors the nondiscrimination prohibitions annunciated above to land use regulations because Congress identified a significant encroachment on the core First and Fourteenth Amendment rights of religious observers. Because § (b)(1) of RLUIPA codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions "on less than equal terms" than secular institutions, § (b) is an appropriate and constitutional use of Congress's authority under § 5 of the Fourteenth Amendment.

C. Establishment Clause

We turn to Surfside's contention that RLUIPA impermissibly elevates religion in a manner contravening the Establishment Clause.

At its core, Surfside's argument implicates the intersection of both religious liberties principles found in the First Amendment—the right to free exercise of religion and the prohibition against establishment of religion. As courts strive for a "benevolent neutrality" toward religion that allows religious exercise to exist without either endorsement or interference, they do so with the recognition that the two Religion Clauses, "both of which are cast in absolute terms," would, if taken to their logical extremes, "tend to clash with [each] other." *Walz*, 397 U.S. at 668-69. When deciding these cases, courts are sometimes forced to enter the debate about whether the Free Exercise Clause

allows exemptions from burdensome laws, *see, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 336 (1987) (upholding a law which granted religious employers an exemption from compliance with Title VII's protection against religious discrimination), or whether the Establishment Clause *prohibits* such exemptions, either on the grounds that an exemption impermissibly discriminates against the nonreligious, *see e.g., Texas Monthly,* 489 U.S. at 9 (plurality opinion) (government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general . . . conveying the message that those who do not contribute gladly are less than full members of the community"), or on the grounds that the exemption impermissibly advances religion. *See, e.g., Edwards v. Aguillard,* 482 U.S. 578, 593 (1987) (striking down Louisiana's Creationism Act because it impermissibly endorses religion).

The three-part test provided by *Lemon* helps determine whether a statute achieves neutrality towards religion by avoiding "sponsorship, financial support, and active involvement of the sovereign in religious activity." 403 U.S. at 612 (quoting *Walz,* 397 U.S. at 668). A statute will survive an Establishment Clause attack if 1) it has a secular legislative purpose, 2) its primary effect neither advances nor inhibits religion, and 3) it does not foster excessive government entanglement with religion. *Id.* at 612-13.[19] "State action

19. The Supreme Court has acknowledged that *Lemon* 's second and third prongs are often interrelated and the simplest way of evaluating whether a statute results in impermissible entanglement (Cont'd)

violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards,* 482 U.S. at 583.

1. Purpose

Lemon first requires that the law at issue serve a "secular legislative purpose." 403 U.S. at 612. The Supreme Court has upheld statutes that "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos,* 483 U.S. at 335, 107 S.Ct. 2862; *see also Hobbie,* 480 U.S. at 144-45, 107 S.Ct. 1046 (noting that "the government may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause"). In requiring neutrality toward religion, the government need not be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice," *Kiryas Joel,* 512 U.S. at 705, nor must the "government show a callous indifference to religious groups." *Zorach,* 343 U.S. at 314. Where, as here, a law's purpose is to alleviate significant government interference with the exercise of religion, that purpose does not violate the Establishment Clause.

(Cont'd)
is to assess it using the same factors used to examine the "effect" prong. *See Agostini v. Felton,* 521 U.S. 203, 232-33 (1997). Evaluating *Lemon* 's second and third prongs together or separately does not affect our analysis; for purposes of clarity, we evaluate each separately.

2. Effect

The second requirement under *Lemon* is that the law in question have a "principal or primary effect . . . that neither advances nor inhibits religion." 403 U.S. at 612. The Supreme Court has said that "[a] law is not unconstitutional simply because it *allows* churches to advance religion. . . . For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337.

We find unpersuasive Surfside's argument that the application of RLUIPA's equal terms provision gives an impermissible special preference to religious interests. *Amos* makes it clear that a law does not violate the Establishment Clause simply because it lifts burdens imposed on religious institutions without affording similar benefits to secular entities. 483 U.S. at 338 ("[W]e see no reason to require that the [burden-alleviating] exemption comes packaged with benefits to secular entities."). Moreover, contrary to Surfside's assertions, RLUIPA does not allow religious assemblies to avoid the application of zoning regulations. RLUIPA does not impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion. RLUIPA instead calls for exactly the opposite—forbidding states from imposing impermissible burdens on religious worship.

For purposes of analyzing the second prong of *Lemon*, a relevant and meaningful distinction exists between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion.

See Amos, 483 U.S. at 336-337; *Kiryas Joel*, 512 U.S. at 719 (O'Connor, J., concurring). RLUIPA, by mandating *equal* as opposed to *special* treatment for religious institutions, does not advance religion by making it easier for religious organizations themselves to advance religion.

3. Entanglement

Under *Lemon* 's third prong, a statute must not result in excessive entanglement between church and state. 403 U.S. at 613. RLUIPA does not require "pervasive monitoring" to prevent the government from indoctrinating religion. *See Agostini*, 521 U.S. at 233. RLUIPA does not call on the government to supervise land use regulations to make sure governmental funds do not sponsor religious practice, nor does it require state or local officials to develop expertise on religious worship or to evaluate the merits of different religious practices or beliefs. RLUIPA requires only that states avoid discriminating against or among religious institutions. As such, RLUIPA passes muster under *Lemon*'s third prong.

That the Constitution's prohibition of the "establishment of religion" also allows—and sometimes mandates—equal treatment of religion seems obvious. Equal treatment maintains the separation of church and state by keeping the government separate from people's decisions about religion, while ensuring that the government does not "make [] adherence to religion relevant to a person's standing in the political community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in judgment); *see also Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in

judgment); *County of Allegheny v. ACLU,* 492 U.S. 573, 626 (1989) (O'Connor, J., concurring in part and concurring in judgment). Because RLUIPA accommodates religion by remedying and preventing discriminatory zoning in accordance with principles established by the First and Fourteenth Amendments, RLUIPA does not violate the Establishment Clause.[20]

D. Tenth Amendment

Finally, we reject the argument that in enacting RLUIPA, Congress violated the Tenth Amendment, which provides that

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20. Surfside's argument that RLUIPA violates the Establishment Clause echoes Justice Stevens' concurring opinion in *Boerne*, which indicated his belief that RFRA violated the Establishment Clause because the statute "provided the Church with a legal weapon that no atheist or agnostic can obtain." *Boerne,* 521 U.S. at 536-37 (Stevens, J., concurring). Many circuits have held that RFRA continues to apply to the federal government. *See Kikumura v. Hurley,* 242 F.3d 950, 959-60 (10th Cir.2001); *In re Young,* 141 F.3d 854, 863 (8th Cir.1998); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir.1996), *vacated on other grounds,* 521 U.S. 1114 (1997); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455, 470 (D.C.Cir.1996); *Flores v. City of Boerne,* 73 F.3d 1352, 1364 (5th Cir.1996), *rev'd on other grounds,* 521 U.S. 507 (1997). While we have not had occasion to decide this question for ourselves, the implication is that if RFRA were constitutionally infirm on Establishment Clause grounds as applied to the states, there would be no principled way to exempt the federal government from the same infirmity. Although we are evaluating RLUIPA's equal terms provision, which, unlike the substantial burden provision, does not have roots in RFRA, we note that the *Boerne* majority declined to adopt Justice Stevens' view of the Establishment Clause.

"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Although RLUIPA intrudes to some degree on local land use decisions, RLUIPA does not violate principles of federalism if it is otherwise grounded in the Constitution. *See New York v. United States*, 505 U.S. 144, 156 (1992). Because RLUIPA is a proper exercise of Congress's power under § 5 of the Fourteenth Amendment, there is no violation of the Tenth Amendment.

Moreover, RLUIPA must not "compel the States to enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 175-77, 188. While RLUIPA may preempt laws that discriminate against or exclude religious institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated. *See Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 759 (1982) ("[T]he Federal government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.") (citation omitted); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (contemplating Fourteenth Amendment's interference with state rights); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (same).

RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of

Congress's § 5 power under the Fourteenth Amendment, which does not run afoul of the Tenth Amendment's protection of the principles of federalism.

Conclusion

For the foregoing reasons, we find that § 90-152 of the SZO violates § (b)(1) of RLUIPA. We **REVERSE** the decision of the district court, and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 8, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE N0. 99-1566-CIV-UNGARO-BENAGES
Magistrate Judge Brown

THIS IS A CONSENT CASE

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

FINAL JUDGMENT

Pursuant to Rule 58, Fed. R Civ. P., and consistent with the Court's Order pursuant to Rule 54(h), Fed. R Civ. P., Final Judgment is entered against Plaintiffs MIDRASH SEPHARDI, INC. and, YOUNG ISRAEL OF BAL HARBOUR, INC., on Counts 1 through 7 of their Third Amended Complaint, and in favor of Defendant as to Count 1 of the Counterclaim, and pursuant to Federal Rule 54(b), as to Count 2 of the Counterclaim seeking injunctive relief.

Appendix B

DONE and ORDERED this day of July, 2003 Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX C — ORDER PURSUANT TO RULE 54(b) DIRECTING ENTRY OF FINAL JUDGMENT AS TO ALL OF THE PLAINTIFFS' CLAIMS AND DEFENDANT'S COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 8, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-1566-CIV-UNGARO-BENAGES
Magistrate Judge Brown

THIS IS A CONSENT CASE

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER PURSUANT TO RULE 54(b) DIRECTING ENTRY OF FINAL JUDGMENT AS TO ALL OF THE PLAINTIFFS' CLAIMS AND DEFENDANT'S COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court hereby directs the entry of a Final Judgment in Defendant's favor on all of Plaintiffs' claims in the Third

Appendix C

Amended Complaint. This Final Judgment is entered as to all the claims of the Plaintiffs for the reasons set forth in the Court's Orders of DE# 215, 295, 296, 317, 335 and 215.

The Final Judgment is also entered in favor of Defendant as to Counts I and II of Defendant's Counterclaim, except for the portion of Count II of the Counterclaim seeking civil penalties and attorneys' fees for the Plaintiffs' violations of the Code of the Town of Surfside. There is no just reason to delay the entry of a Final Judgment on all of the claims presented by the Third Amended Complaint and the Counterclaims, other than the Counterclaims for civil penalties and attorneys' fees.

DONE and ORDERED this day of July, 2003 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX D — ORDER GRANTING INJUNCTIVE RELIEF AND ENTERING PERMANENT INJUNCTION AGAINST PLAINTIFFS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 8, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-1566-CIV-UNGARO-BENAGES
Magistrate Judge Brown

THIS IS A CONSENT CASE

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER GRANTING INJUNCTIVE RELIEF AND ENTERING PERMANENT INJUNCTION AGAINST PLAINTIFFS

THIS MATTER is before the Court on Defendant Town of Surfside's Counterclaim for Injunctive Relief. This Court has reviewed the Counterclaim, and all pertinent materials in the file.[1] The Court adopts the findings and rulings made

1. Plaintiff's did not file an answer to the Counterclaims raised in response to the Plaintiffs' original and Third Amended Complaint. (Cont'd)

in its Second Amended Order on Motion for Reconsideration entered June 5, 2003, and supplements those findings and rulings as follows.

This Court has granted summary judgment as to the injunctive relief requested in Count II of the Counterclaim. In doing so, the Court makes the following findings of fact and conclusions of law:

1. The Defendant, Town of Surfside ("Surfside"), seeks a permanent injunction enjoining the Plaintiffs, Midrash Sephardi, Inc. and Young Israel of Bal Harbour, Inc. (referred to jointly as "Plaintiffs") from violating Surfside's municipal ordinances, including but not limited to, having Plaintiffs cease and desist any further actions that constitute violations of Chapter 90 of the Town Code, including prohibiting Plaintiffs from operating synagogues or houses of worship at locations in the Town of Surfside's B-1 Business District and RT-1 Tourist District, including at 9592 Harding Avenue and 9501 Collins Avenue.

2. The requirements for issuance of a permanent injunction, all of which the Defendant has established, are:

A. The injunction is necessary to prevent irreparable harm and there is an unavailability of an adequate remedy at law;

B. Success on the merits;

C. The threatened injury to the movant outweighs any possible harm the injunction would inflict on the non-movant; and

D. The granting of a permanent injunction will serve the public interest.

3. Plaintiff's have admitted that by locating in the tourist and business districts, they violated, and continue to be in violation of, Surfside's zoning code see Notice of Filing (summarizing admissions)). The Court has, in prior Orders, found the pertinent Ordinances and Surfside's zoning scheme to be constitutional and enforceable. Accordingly, Defendant is now entitled to injunctive relief. *See Metropolitan Dade County v. O'Brien*, 660 So.2d 364, 365 (Fla. 3d DCA 1995) ("Where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed." (citations omitted)).

4. The Plaintiffs' violations of the foregoing municipal ordinances outweigh any individual right the Plaintiffs may claim to have. An injunction does not prevent the Plaintiffs from complying with the law, but rather serves the public interest in preventing the Plaintiffs' continuing violations of law in the B-1 Business and RT-1 Tourist Districts in Surfside.

5. The granting of a permanent injunction in favor of Surfside will serve the public interest in preventing violations of law. The balance of harms also weighs in favor of granting injunctive relief for Surfside. No damage or harm will result

to the plaintiffs by granting injunctive relief. Any alleged damage or harm is solely within the Plaintiffs' control and ability to remedy. The injunction will protect public health, safety or welfare and, on balance, the harm to Surfside and the public if injunctive relief is *not* granted will far outweigh the harm to the Plaintiffs if an injunction is granted.

6. The Plaintiff's received fair notice and an opportunity to be heard.

Accordingly, it is **ORDERED and ADJUDGED** as follows:

A permanent injunction, effective ninety (90) days from the date of this Order, is entered against Plaintiffs, Midrash Sephardi, Inc. and Young Israel of Bal Harbour, Inc., jointly and severally, and each of their officers, directors, agents, heirs, successors, or assigns, enjoining and restraining them from directly or indirectly occupying or operating synagogues or houses of worship at locations in the Town of Surfside's B-I Business District and RT-1 Tourist District, and at 9592 Harding Avenue, Surfside, Florida or 9501 Collins Avenue, Surfside, Florida, or maintaining, or permitting the operation, use or occupancy by any person of the property in such manner.

DONE and ORDERED this 8th day of July, 2003 at Miami, Florida.

s/ Stephen T. Brown
Stephen T. Brown
U.S. MAGISTRATE JUDGE

APPENDIX E — SECOND AMENDED ORDER AND AMENDED ORDER ON MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MAY 19, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

SECOND AMENDED ORDER ON MOTION FOR RECONSIDERATION

THIS MATTER is before this Court on Defendant Town of Surfside's Motion for Reconsideration, filed April 4, 2003. This Court has reviewed the motion, the responses, the reply, and all pertinent materials in the file. The Court adopts the findings and rulings made in its Amended Order on Motion for Reconsideration, issued May 19, 2003, and supplements those findings and rulings as follows.

Appendix E

In its Motion for Reconsideration, Surfside included a request that this Court reconsider its prior ruling denying its Motion for Summary Judgment on Surfside's Counterclaims, filed August 2, 2000, with respect to Count II, which states:

> WHEREFORE, Surfside requests this Court issue an injunction ordering Midrash and Young Israel to cease and desist any further actions which constitute violations of Chapter 90 of the Code, including Midrash and Young Israel from operating synagogues or houses of worship or other similar activities at 9592 Harding Avenue and 9501 Collins Avenue. Surfside further demands judgment in its favor for civil penalties up to $1,000 per day, plus the costs of this action, and attorneys' fees pursuant to Sections 1-8 and 90-3 of the Code.

In its Amended Order, this Court reconsidered its prior ruling denying Defendant's Motion for Summary Judgment on Count VII of the Third Amended Complaint, and found that there were no genuine issues of material fact as to that claim, the only remaining claim raised by Plaintiff in this action. Accordingly, the Court granted the Defendant's Motion for Summary Judgment as to Count VII in its entirety. When this Court initially denied the Defendant's Motion for Summary Judgment as to Count VII, it also, in a separate Order, denied Defendant's Motion for Summary Judgment on Surfside's Counterclaims, filed August 2, 2000, based on the fact that it had found issues of fact with respect to Count VII. Now that the Court has reconsidered that ruling and granted summary judgment to Defendant on all counts of

Plaintiff's Third Amended Complaint, the Court finds that Defendant is entitled to partial summary judgment on its Counterclaim, to the extent that it requests injunctive relief.[1]

Plaintiffs did not file an answer to the Counterclaims raised in response to the Plaintiffs' original and Third Amended Complaints. Plaintiffs did serve a Reply to the Counterclaims raised in response to the Second Amended Complaint, however, that Reply apparently was never filed in the court record. Defendant has attached a copy of Plaintiff's Reply to its Notice of Filing List of Court Documents Containing Plaintiffs' Admissions Regarding Surfside's Counterclaims for Injunctive Relief, Penalties and Attorneys' Fees, filed May 30, 2003 ("Notice of Filing"). Viewing this matter in the light most favorable to Plaintiffs, and considering their Reply with respect to the most recently filed Counterclaims, it is clear that Defendant is entitled to summary judgment as to injunctive relief at this point in the proceedings.

Plaintiffs have admitted that by locating in the tourist and business districts, they violated, and continue to be in violation of, Surfside's zoning code (*see* Notice of Filing (summarizing admissions)). The Court has, in prior Orders, found the pertinent Ordinances and Surfside's zoning scheme to be constitutional and enforceable. Accordingly, Defendant is now entitled to injunctive relief. *See Metropolitan Dade County v. O'Brien*, 660 So. 2d 364, 365 (Fla. 3d DCA 1995)

1. The Court notes that in their memorandum in response to Defendant's Motion for Summary Judgment as to the counterclaims, Plaintiffs failed to respond to Defendant's argument that it is entitled to injunctive relief.

("Where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed." (citations omitted)). All that remains for determination by the Court as to this issue is the form of the order.[2]

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion for Reconsideration is hereby GRANTED as to Defendant's Counterclaims.

2. Defendant's Motion for Summary Judgment on Surfside's Counterclaims is hereby **GRANTED**, in part, as to the request for injunctive relief in Count II.

DONE AND ORDERED this 5th day of June, 2003 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

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2. A hearing on this issue is being set by separate order.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

AMENDED ORDER ON MOTION FOR RECONSIDERATION[1]

THIS MATTER is before this court on Defendant Town of Surfside's Motion for Reconsideration, filed April 4, 2003. This court has reviewed the motion, the responses, the reply, and all pertinent materials in the file.

The motion at issue concerns the single remaining claim in this action - Plaintiffs' allegation that §§ 90-151 and 90-152 of the Surfside Zoning Code violate the Equal Terms provision of RLUIPA, § 2(b)(1), in that they allow private clubs and other secular places of public assembly in the tourist and business districts, but disallow churches and synagogues. In its prior Order dated January 2, 2003, this Court denied Defendant's Motion for Summary Judgment on this single claim, and granted the motion as to the other alleged violations of RLUIPA.

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1. The Court has added one citation on page 8.

Appendix E

FACTS

This Court thoroughly set forth the facts of this case and discussed the Ordinances at issue in its Order Re: Final Summary Judgment dated July 13, 2000 (hereinafter referred to as "7/13/00 Order"); and its Order on Motions for Summary Judgment with respect to Count VII, dated January 2, 2003 (1/2/03 Order). This Court adopts the findings of fact contained therein.

DISCUSSION[2]

Defendant argues that the Court's Order must be reconsidered because it is inconsistent with certain findings the Court previously made in the 7/13/00 Order, and because the record demonstrates no triable issues of fact.

I. Discriminatory Purpose

Defendant initially argues that there can be no violation of §2(b)(1) of RLUIPA because in the 7/13/00 Order the Court ruled that Plaintiffs failed to prove that there was a discriminatory purpose in the City's enactment of the Ordinances at issue. The Court rejects this argument, because although an equal protection violation based on a facially neutral statute requires a showing that "the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff," *see Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996), in Count VII

2. This Court adopts its prior discussion of the standards applicable on a motion for summary judgment.

Plaintiffs allege that §§ 90-151 and 90-152 are discriminatory on their face. The analysis to be applied in determining whether facially discriminatory legislation constitutes an equal protection challenge does not require independent evidence of discriminatory intent. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).

Rather; the analysis is whether the City can show a rational reason for the differential treatment of the Plaintiff's and similarly situated non-religious entities. If not, an equal protection violation exists. To the extent that the Court previously found that Surfside's zoning scheme was facially neutral, the Court there performed a Free Exercise of religion analysis, and found, in sum, that because regulating the location of churches is not regulating religious beliefs, the ordinance scheme did not present a Free Exercise violation on its face. To the extent, however, that §§ 90-151 and 90-152 do not allow religious institutions, but yet allow certain other similarly situated uses, they are not facially neutral for proposes of an Equal Protection analysis. Accordingly, the Court finds that its prior Order is not inconsistent and that no reconsideration is necessary as to this issue. For the same reason, there is nothing inconsistent with the Court's previous ruling and the concept that RLUIPA codifies existing Equal Protection law.[3]

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3. Although the Court did apply the two prong facially neutral analysis in its Order on Motion for Summary Judgment addressed to the equal protection claim raised in Count V, that claim concerned the City's alleged discriminatory enforcement of violations of its Code (i.e., violation of facially neutral legislation).

Appendix E

II. Similarly Situated

Defendant next argues that Court has already ruled that the Plaintiffs are not similarly situated to private clubs or other secular institutions that are allowed to locate in the business and tourist districts. Defendant relies on the Court's finding that

> [t]he text of the Ordinance provides that churches, synagogues, educational or philanthropic institutions (including museums), parking lots and garages, public and governmental buildings and public utility/ public service uses are all Conditional Uses . . . [which] . . . fall within Justice Harlan's natural perimeter test, as this would apply to a group of secular and non-secular uses that "are of a public or semi-public character" §90-41(a).

7/13/00 Order p. 17. The Court also found, relative to "the ostensible purpose of B-1 to provide for the retail and personal service needs of the Town's residents and tourists," that "[p]rivate clubs provid[e] more of a social setting, provide more synergy for the shopping district in keeping with the purpose of § 90-152," than churches and synagogues. *Id.*

Plaintiff correctly notes that the initial finding pertained to Plaintiff's Free Exercise challenge to the City's conditional use requirement for houses of worship. The Court agrees with Defendant, however, that the second finding, as further discussed below, does support Defendant's Motion for Summary Judgment on the Equal Terms claim.

Appendix E

III. Rational Basis Analysis

Defendant argues that even if Plaintiffs can prove that they are similarly situated to other uses allowed in the business and tourist districts, there is no issue of fact regarding whether the City has demonstrated a rational basis to distinguish between houses of worship and these other uses, to support their exclusion. Defendant points to the deposition testimony of expert witness Jack Luft, a professional planner who testified, in sum, that generally houses of worship do not contribute to the economic vitality of these districts, in the manner that the other uses do. Mr. Lull contrasted the principal activity of houses of worship, "a spiritual pursuit," to that of social clubs or lodge halls which are "social organization[s]." Mr. Luft also discussed his opinion that churches and synagogues do not belong in the business and tourist districts because they fail to satisfy the need to optimize "cross-shopping behavior":

> Part of it has to do with the size of the institutions. Part of it has to do with parking patterns. Part of it has to do with the varied disruption to the fabric of the retail district by any institution, church or school or governmental office that breaks the pattern of a tightly – of a compact, cohesive retail district. So part of it is a use issue, part of it is a physical impact issue, part of it is a functional issue of parking. There's several factors that come together. (Luft depo. pp. 30-31).

> I can tell you that I'm aware of circumstances where churches, synagogues, schools and

government buildings, all of which are of the institutional type and greatly similar in their types of use activity, have been placed within commercial districts and have caused enormous disruption and, in fact, have killed off significant portions of retail areas because of the disruption that they've caused.

And what the Town of Surfside has done, it has said that schools, not traffic schools which are a peculiar office type of use, but public schools, private school, schools as we normally define schools, government buildings and churches and synagogues and houses of worship generally are not permitted within the business district. And they've drawn that line and they've kept it to a collection of businesses that are traditionally defined as retail and retail services. And they've done that to preserve the integrity of the fabric of the district, and the Master Plan reflects that goal and policy quite clearly. It simply states that they shall maintain a compact and cohesive retail district, and you cannot control either the size or the habits of the people that go to these types of institutions. What you can reliably predict is that, on the average, they will be less of a contributor to the district than a retail use will. (Luft depo. pp. 48-49.)

The nature of the activity as a spiritual pursuit and typical times that they do that and the typical ways that worshipers interact with activities

around them is, on the whole, far less related to the nature of a commercial district than broad social entertainment activities, group socializing. (Luft depo. p. 62.)

The typical [religious] experience is once a week, and it is typical, during a weekday, and there is virtually no one there. There's virtually no activity there, and it is the net sum of that empty space and that typical lack of activity that is the detriment to a retail district that depends on a high degree of activity and a high degree of traffic during normal business hours. (Luft depo. pp. 63-64).

Most churches [sit] largely empty and unused during the weekdays. That's typical now. And it's that impact which you cannot control and I cannot control. (Luft depo p. 64)

In opposition to this testimony, Plaintiffs offer the affidavits of Rabbi Chaim Casper, of Young Israel. Rabbi Casper states, in pertinent part:

8. Synagogue worship services on the Sabbath (Friday evening, Saturday morning and evenings) and holidays include, without limitation, religious prayer, song, Torah readings, sermons, group discussions, required festivities, celebration of religious events and religious study. During the tourist season, Young Israel conducts daily rooming, afternoon and evening prayer services

and Torah study classes Wednesday evenings and on the Sabbath.

9. During the tourist season, attendance at Young Israel synagogue services increases dramatically and virtually triples due to the seasonal tourist population on the Collins Avenue oceanfront, seasonal tourist population on Jewish holidays, and at times on the Sabbath, due to its small size. Young Israel relies heavily on tourists and seasonal residents for large attendance and financial support.

15. Surf Florist generates most of its retail sales from the three towns of Surfside, Bal Harbour and Bay Harbour Islands, with the majority coming from Bar Harbour residents. I also routinely witness my customers from Bal Harbour and Bay Harbor Islands frequent other retail and service establishments in Surfside's business district.

16. . . . I have had many customers coming straight from the synagogue to purchase flowers after services and I personally witness daily congregants going to the kosher bakery or grocery store shipping after morning services (except Saturday when it is prohibited).

Affidavit of Chaim Casper, filed February 23, 2003.

Appendix E

Rabbi Nissim Elnecave of Plaintiff Midrash Sephardi states, inter alia:

> 23. . . . First, most Jewish synagogues are generally open for services daily; mornings, afternoons and evenings. Second, most Muslim mosques are open for daily prayer five times a day. Third, most churches of different Christian denominations I have known in my lifetime, particularly Catholic churches, are open for mass or services daily.
>
> . . .
>
> 25. . . . First, our members, especially attendees at daily morning services and bible and *Halacha* study classes, regularly frequent the shops before or after attending the synagogue, as do I.
>
> 26. Second, every Sabbath and Jewish holiday, Midrash provides meals after services and bagel and lox breakfasts every Sunday morning. All our food, paper and other supplies are purchased at the Hyde Market, Kastners and Eckerds – stores in the Surfside business district.
>
> 27. Third, since Orthodox synagogues have opened in Surfside, the business district has a kosher bakery and a full-service kosher food and bakery counter which do robust business. . . .

Affidavit of Nissim Elnecave, filed February 23, 2003.

Appendix E

Plaintiffs claim that Defendant is not entitled to summary judgment based on *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). In that case, the Eighth Circuit noted that the district court failed to deal with the "vital inquiry" as to "whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone," and that "[a]ny differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance." *Id.* at 471. The Court stated:

> The City is excluding the Church because it will not generate economic activity, but the Church has established a relevant similarity between itself and permitted non-commercial entities. It is now incumbent on the City to provide the rational basis for this apparent unequal treatment of similarly situated entities. The City has failed to support its exclusion of the Church with any justification beyond the conclusory statements in the affidavits of the city planners. (Citation omitted) (Emphasis added).

Id. at 471-72.

In this case, Defendant has supported its differential treatment of houses of worship through the expert testimony of a professional planner who served for eleven years on the Design Review Board of Miami Beach. Mr. Luft testified that in rendering his opinion, in addition to reviewing relevant documentation, he performed a "windshield survey" of the community, had discussions with the City manger regarding current developments and the state of the real estate market,

did photo surveys, walked in the shops, and spoke with shopkeepers about business and conditions in the area. Luft depo. pp. 6-8.

Although there may be exceptions to the statements by Mr. Luft, the Court finds that this testimony supports a finding that the ordinances do not violate the Equal Terms clause. The Supreme Court has reiterated that "where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). Rather, government action should not be overturned unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000). In *Kimel*, which concerned an alleged equal protection violation based on age, in applying a rational basis review the Court noted that "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 86 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991)).

Under the rational basis standard, "a classification 'must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.'" *Nyugen v. Immigration and Naturalization Service*, 533 U.S. 53, 77 (2001) (citing *Hefer v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v.*

Beach Communications, 508 U.S. 307, 313 (1993)). In such a determination, as opposed to a heightened scrutiny analysis, the court is allowed "to hypothesize interests that might support legislative distinctions." *Id.* at 77; *see also Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) ("The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational basis scrutiny.") (quoting *Haves v. City of Miami*, 52 F.3d 918, 921-22 (11th Cir. 1995) (emphasis in original)). Furthermore, the Eleventh Circuit has stated that under the rational basis test, "a court gives great deference to economic and social legislation." *Gary v. City of Warner Robins*, 311 F.3d 1334 (11th Cir. 2002).

Upon reconsideration of the record, the Court finds that the City has demonstrated that there is no triable issue of fact concerning whether the zoning classifications in §§ 90-151 and 90-152 of the Surfside Zoning Code violate the equal terms provision of RLUIPA. The testimony provided by the Rabbis as to the practices of other houses of worship is without foundation and constitutes hearsay. With respect to their statements regarding their own houses of worship, even accepting that testimony as true does not create an element of irrationality in the City's zoning decisions, in that the Court must examine the general categories of uses which the City chose to treat differently for zoning purposes. Plaintiffs have offered no competent evidence, in the way of

expert testimony or otherwise, to counter the testimony of Mr. Luft that on a general scale, certain uses (including houses of worship) do not enhance the City's legitimate goal. Because the Court finds that the City has demonstrated that these classifications are rationally related to the City's stated purpose of increasing the economic vitality of the business and tourist districts, Defendant is entitled to summary judgment on this claim as well.

IV. Conclusion

Based on the foregoing analysis, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Town of Surfside's Motion for Reconsideration is hereby **GRANTED**.

2. Defendant's Summary Judgment on Plaintiffs' Third Amended Complaint's "Seventh Claim for Relief' is hereby **GRANTED** as to all claims that Surfside's zoning code violates RLUIPA.

3. Plaintiff's Motion for Summary Judgment on Count VII of the Third Amended Complaint remains **DENIED** in all respects.

DONE AND ORDERED this 19th day of May, 2003 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX F — ORDER ON MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MAY 13, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER ON MOTION FOR RECONSIDERATION

THIS MATTER is before this court on Defendant Town of Surfside's Motion for Reconsideration, filed April 4, 2003. This court has reviewed the motion, the responses, the reply, and all pertinent materials in the file.

The motion at issue concerns the single remaining claim in this action – Plaintiffs' allegation that §§ 90-151 and 90-152 of the Surfside Zoning Code violate the Equal Terms provision of RLUIPA, § 2(b)(1), in that they allow private clubs and other secular places of public assembly in the tourist and business districts, but disallow churches and synagogues. In its prior Order dated January 2, 2003, this

Court denied Defendant's Motion for Summary Judgment on this single claim, and granted the motion as to the other alleged violations of RLUIPA.

FACTS

This Court thoroughly set forth the facts of this case and discussed the Ordinances at issue in its Order Re: Final Summary judgment dated July 13, 2000 (hereinafter referred to as "7/13/00 Order"), and its Order on Motions for Summary Judgment with respect to Count VII, dated January 2, 2003 (1/2/03 Order). This Court adopts the findings of fact contained therein.

DISCUSSION[1]

Defendant argues that the Court's Order must be reconsidered because it is inconsistent with certain findings the Court previously made in the 7/13/00 Order, and because the record demonstrates no triable issues of fact.

I. Discriminatory Purpose

Defendant initially argues that there can be no violation of § 2(b)(1) of RLUIPA because in the 7/13/00 Order the Court ruled that Plaintiffs failed to prove that there was a discriminatory purpose in the City's enactment of the Ordinances at issue. The Court rejects this argument, because although an equal protection violation based on a facially

1. This Court adopts its prior discussion of the standards applicable on a motion for summary judgment.

neutral statute requires a showing that "the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff," *see Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996), in Count VII Plaintiffs allege that §§ 90-151 and 90-152 are discriminatory on their face. The analysis to be applied in determining whether facially discriminatory legislation constitutes an equal protection challenge does not require independent evidence of discriminatory intent. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).

Rather, the analysis is whether the City can show a rational reason for the differential treatment of the Plaintiffs and similarly situated non-religious entities. If not, an equal protection violation exists. To the extent that the Court previously found that Surfside's zoning scheme was facially neutral, the Court there performed a Free Exercise of religion analysis, and found, in sum, that because regulating the location of churches is not regulating religious beliefs, the ordinance scheme did not present a Free Exercise violation on its face. To the extent, however, that §§ 90-151 and 90-152 do not allow religious institutions, but yet allow certain other similarly situated uses, they are not facially neutral for purposes of an Equal Protection analysis. Accordingly, the Court finds that its prior Order is not inconsistent and that no reconsideration is necessary as to this issue. For the same reason, there is nothing inconsistent with the Court's previous ruling and the concept that RLUIPA codifies existing Equal Protection law.[2]

---

2. Although the Court did apply the two prong facially neutral analysis in its Order on Motion for Summary Judgment addressed to

(Cont'd)

Appendix F

II. Similarly Situated

Defendant next argues that Court has already ruled that the Plaintiffs are not similarly situated to private clubs or other secular institutions that are allowed to locate in the business and tourist districts. Defendant relies on the Court's finding that

> [t]he text of the Ordinance provides that churches, synagogues, educational or philanthropic institutions (including museums), parking lots and garages, public and governmental buildings and public utility/public service uses are all Conditional Uses . . . [which] . . . fall within Justice Harlan's natural perimeter test, as this would apply to a group of secular and non-secular uses that "are of a public or semi-public character" § 90-41(a).

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to Plaintiff's Free Exercise challenge to the City's conditional use requirement for houses of worship. The Court agrees with Defendant, however, that the second finding, as further discussed below, does support Defendant's Motion for Summary Judgment on the Equal Terms claim.

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Defendant argues that even if Plaintiffs can prove that they are similarly situated to other uses allowed in the business and tourist districts, there is no issue of fact regarding whether the City has demonstrated a rational basis to distinguish between houses of worship and these other uses, to support their exclusion. Defendant points to the deposition testimony of expert witness Jack Luft, a professional planner who testified, in sum, that generally houses of worship do not contribute to the economic vitality of these districts, in the manner that the other uses do. Mr. Luft contrasted the principal activity of houses of worship, "a spiritual pursuit," to that of social clubs or lodge halls which are "social organization[s]." Mr. Luft also discussed his opinion that churches and synagogues do not belong in the business and tourist districts because they fail to satisfy the need to optimize "cross-shopping behavior":

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And what the Town of Surfside has done, it has said that schools, not traffic schools which are a peculiar office type of use, but public schools, private school, schools as we normally define schools, government buildings and churches and synagogues and houses of worship generally are not permitted within the business district. And they've drawn that line and they've kept it to a collection of businesses that are traditionally defined as retail and retail services. And they've done that to preserve the integrity of the fabric of the district, and the Master Plan reflects that goal and policy quite clearly. It simply states that they shall maintain a compact and cohesive retail district, and you cannot control either the size or the habits of the people that go to these types of institutions. What you can reliably predict is that, on the average, they will be less of a contributor to the district than a retail use will. (Luft depo.

pp. 48-49.)

> The nature of the activity as a spiritual pursuit and typical times that they do that and the typical ways that worshipers interact with activities around them is, on the whole, far less related to the nature of a commercial district than broad social entertainment activities, group socializing. (Luft depo. p. 62.)

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Appendix F

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Rabbi Nissim Elnecave of Plaintiff Midrash Sephardi states, inter alia:

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Appendix F

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community, had discussions with the City manger regarding current developments and the state of the real estate market, did photo surveys, walked in the shops, and spoke with shopkeepers about business and conditions in the area. Luft depo. pp. 6-8.

Although there may be exceptions to the statements by Mr. Luft, the Court finds that this testimony supports a finding that the ordinances do not violate the Equal Terms clause. The Supreme Court has reiterated that "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (citing *Dandridge v. Williams*, 397 U.S. 471 , 485 (1970). Rather, government action should not be overturned unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 86 (2000). In *Kimel*, which concerned an alleged equal protection violation based on age, in applying a rational basis review the Court noted that "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 86 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

Under the rational basis standard, "a classification 'must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.'" *Nyugen v. Immigration*

and Naturalization Service, 533 U.S. 53, 77 (2001) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993). In such a determination, as opposed to a heightened scrutiny analysis, the court is allowed "to hypothesize interests that might support legislative distinctions." *Id.* at 77; *see also Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) ("The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational basis scrutiny.") (quoting *Haves v. City of Miami*, 52 F.3d 918, 921-22 (11th Cir. 1995)) (emphasis in original).

Upon reconsideration of the record, the Court finds that the City has demonstrated that there is no triable issue of fact concerning whether the zoning classifications in §§ 90-151 and 90-152 of the Surfside Zoning Code violate the equal terms provision of RLUIPA. The testimony provided by the Rabbis as to the practices of other houses of worship is without foundation and constitutes hearsay. With respect to their statements regarding their own houses of worship, even accepting that testimony as true does not create an element of irrationality in the City's zoning decisions, in that the Court must examine the general categories of uses which the City chose to treat differently for zoning purposes. Plaintiffs have offered no competent evidence, in the way of expert testimony or otherwise, to counter the testimony of Mr. Luft that on a general scale,

certain uses (including houses of worship) do not enhance the City's legitimate goal. Because the Court finds that the City has demonstrated that these classifications are rationally related to the City's stated purpose of increasing the economic vitality of the business and tourist districts, Defendant is entitled to summary judgment on this claim as well.

IV. Conclusion

Based on the foregoing analysis, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Town of Surfside's Motion for Reconsideration is hereby **GRANTED**.

2. Defendant's Summary Judgment on Plaintiffs' Third Amended Complaint's "Seventh Claim for Relief" is hereby **GRANTED** as to all claims that Surfside's zoning code violates RLUIPA.

3. Plaintiff s Motion for Summary Judgment on Count VII of the Third Amended Complaint remains **DENIED** in all respects.

DONE AND ORDERED this 13th day of May, 2003 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX G — ORDER ON MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 3, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before this court on Defendant Town of Surfside's Motion for Summary Judgment on Count V of Plaintiffs' Second Amended Complaint; Motion for Summary Judgment on Surfside's Counterclaims, filed August 2, 2000. This court has reviewed the motion, the response, the reply, and all pertinent materials in the file. In addition, a hearing was held on June 25, 2001. This Court adopts the transcript of that hearing by reference herein.

The motion at issue concerns Plaintiffs' Fifth Claim for Relief (Free Exercise and Equal Protection as Applied). This Court has thoroughly set forth the facts of this case and discussed the

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Ordinances at issue in its prior Order Re: Final Summary Judgment dated July 13, 2000 and its Order on Motions for Summary Judgment dated January 2, 2003. This Court adopts the findings of fact and conclusions of law contained therein, and adds the following pertinent facts.

FACTS

Plaintiffs base their equal protection as applied claim on the following allegation:

> 121. In allowing the Mogen David Congregation to operate in violation of the Zoning Code for 33 years in a single family residential zoning district in which synagogues are not permitted, but enforcing the same zoning prohibition against Midrash and Young Israel, who were and are similarly situated, the defendant has engaged in the selective enforcement of the law among different religious groups, thereby infringing on plaintiffs' rights to be treated alike, as guaranteed by the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the . . . United States Constitution.

Third Am. Complt. ¶ 121.

Appendix G

DISCUSSION[1]

In order to prove an equal protection claim based on a facially neutral statute Plaintiffs must establish that: (1) they were treated differently than similarly situated persons; and (2) Surfside unequally applied the facially neutral statute for the purpose of discriminating against Plaintiffs. *See Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996). The Court finds that Plaintiffs have failed to establish that there is an issue of fact as to either prong.

I. Similarly Situated Persons

As noted by the Eleventh Circuit, "[d]ifferent treatment of dissimilarly situated persons does not violate the Equal Protection Clause." *Id.* at 265 (citing *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987)). Plaintiffs argue that they are similarly situated to the Mogen David Congregation. The Court finds that Plaintiffs have failed to meet their burden for two reasons.

First, it is undisputed that Mogen David Congregation is, and has been, located in a residential district, whereas Plaintiffs are now located in the business district, with Plaintiff Young Israel having formerly been located in the tourist district. The fact that the three congregations are located in different zones, which serve different zoning interests, prevents them from being considered to be "similarly situated" for purposes of determining whether Surfside's enforcement of its zoning laws was discriminatory.

1. This Court adopts its prior discussion of the standards applicable on a motion for summary judgment.

The Court can envision circumstances in which the type of zone in which an entity is located could dictate whether a city would choose to allow a nonconforming use.

Moreover, the affidavits submitted by the parties reveal that there are other significant differences between Plaintiffs and Mogen David Congregation, with respect to congregation size and use of facilities. Because of this, Surfside is not "enforcing the same zoning prohibition" against Plaintiffs and Mogen David Congregation. For the foregoing reasons, the Court finds that Plaintiff cannot show that they are similarly situated to the Mogen David Congregation.

II. Evidence of Discrimination

The United States Supreme Court has stated that for purposes of an equal protection violation, "a discriminatory purpose is not presumed," and that "there must be a showing of 'clear and intentional discrimination'." *Snowden v. Hughes*, 321 U.S. 1, 8 (1943) (citations omitted). Further elaborating on the concept, the Eleventh Circuit noted that:

> "[d]iscriminatory purpose" implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part "because of . . . its adverse effects upon an identifiable group. [Citation omitted.]. Thus, for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard.

E & T Realty, 830 F.2d at 1114. Moreover, "mere error or mistake in judgment or even an arbitrary and capricious action when applying a facially neutral statute does not violate the equal protection clause"; rather, "there must be intentional discrimination." *Id.* at 1114.

Plaintiffs have presented no evidence that Surfside's decision to allow Mogen David Congregation to remain in the residential district, while at the same time seeking to prohibit Plaintiffs from locating in the business and tourist districts as per the zoning code, was based on "an unjustifiable, group-based standard." Plaintiffs claim that a triable issue of fact exists, based on the following argument:

> Viewed in toto, given the small size of the Town and the opening of only four synagogues in more than a thirty year period; Surfside's extensive, documented efforts to prevent the Shul of Bal Harbour, Midrash and Young Israel from opening up, purportedly on zoning grounds; the synagogue and church related ordinances becoming more restrictive over time, support an inference that Surfside's selective enforcement is based on an impermissible motive – be it political or religious.

Plfs. Memo. in Resp. at 10.

Plaintiffs miss the mark with respect to their burden. Assuming that Plaintiffs could show that they are similarly situated, they must prove that the act of enforcing the code against them, while allowing Mogen David Congregation, another orthodox synagogue, to remain where it is located

despite the fact that it is violating a zoning ordinance, is based on intentional discrimination. The Court agrees with Defendant that Surfside's conduct in allowing Mogen David to remain would suggest *not* discrimination, but rather that Surfside is not enforcing the code against Plaintiffs based on the fact that they are an orthodox Jewish congregation.

The Court finds that Plaintiffs have failed to show a material factual dispute as to whether there has been "clear and intentional discrimination" with respect to different treatment of Plaintiffs and Mogen David Congregation. Accordingly, summary judgment is warranted on this basis as well.

III. Counterclaim

Surfside moves for summary judgment on its second counterclaim, Count 11, which states:

> WHEREFORE, Surfside requests this Court issue an injunction ordering Midrash and Young Israel to cease and desist any further actions which constitute violations of Chapter 90 of the Code, including Midrash and Young Israel from operating synagogues or houses of worship or other similar activities at 9592 Harding Avenue and 9501 Collins Avenue. Surfside further demands judgment in its favor for civil penalties up to $1,000 per day, plus the costs of this action, and attorneys' fees pursuant to Sections 1-8 and 90-3 of the Code.

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Because this Court has found that there is an issue of fact regarding whether §§ 90-151 and 90-152 of the Surfside Zoning Code violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), the Court denies Defendant's motion for summary judgment on this counterclaim.

IV. Conclusion

Based on the foregoing analysis, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Town of Surfside's Motion for Summary Judgment on Count V of Plaintiffs' Second Amended Complaint is hereby **GRANTED**.

2. Defendant Town of Surfside' Motion for Summary Judgment on Surfside's Counterclaims [sic] is hereby **DENIED**.

DONE AND ORDERED this 3rd day of January, 2003 at Miami Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX H — ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 2, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER is before this court on Defendant Town of Surfside's Motion for Summary Judgment on Plaintiffs' Third Amended Complaint's "Seventh Claim for Relief," filed July 6, 2001, and on Plaintiffs Motion for Summary Judgment on Count VII of the Third Amended Complaint, filed August 8, 2001. This court has reviewed the motions, the responses, the replies, and all pertinent materials in the file.

The motions at issue concern Plaintiffs' Seventh Claim for Relief (Free Exercise of Religion - Religious Land Use

and Institutionalized Persons Act of 2000). This Court thoroughly set forth the facts of this case and discussed the Ordinances at issue in its prior Order Re: Final Summary Judgment dated July 13, 2000 (hereinafter referred to as "7/13/00 Order"). This Court adopts the findings of fact and conclusions of law contained therein, and adds the following pertinent facts.

FACTS

Plaintiff Young Israel no longer operates at the Coronado Hotel. Plaintiffs state that Young Israel is "actively and diligently searching for a new location to operate in the same tourist (multifamily) district, or in the business district. . . ." In the meantime, its members are attending services at Midrash Sephardi in the B-1 zoning district.

DISCUSSION[1]

Plaintiffs move for summary judgment on Count VH, in which Plaintiff's allege that Article IV of the Surfside Zoning Code, particularly §§ 90-151, 90-152, 90-147 and 90-41 violate §§ 2(a)(1), 2(b)(1) and 2(b)(3)(B) and 2(a)(1) of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA" or "the Act"). Defendant Surfside also moves for summary judgment as to Count VII, arguing that there is no issue of material fact that its zoning code does not violate that statute. Alternatively, Defendant argues that if there is a violation, RLUIPA is unenforceable because it violates the First Amendment Establishment Clause, and Tenth Amendment principles of federalism and separation of powers.

1. This Court adopts its prior discussion of the standards applicable on a motion for summary judgment.

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I. Standing and Other Prudential Concerns

This Court found in its 7/13/00 Order that Plaintiffs did not have standing to contest the constitutionality of Ordinance §90-41, which provides the procedures for obtaining a Conditional Use Permit.[2] Plaintiffs request that the Court reconsider that finding. The Court rejects Plaintiffs' argument that they have demonstrated "a substantial likelihood that [§90-41] will be enforced against the plaintiffs based on Surfside's conduct to date."[3] Therefore, the Court declines to reconsider its prior ruling, and will confine its discussion to §§ 90-151 and 90-152, and finds that as to those Ordinances, the claim is not moot.

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2. Ordinance §90-147, which concerns the RD- 1 two-family residential district, allows religious institutions as a permitted conditional use.

3. Plaintiffs cite *Florida Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000) in support of their standing argument. However, this Court has already determined that standing based on an unlawful prior restraint, which that case concerns, is not applicable here. The Court also rejects Plaintiffs' argument that the Court previously ruled on the standing issue without notice. As Defendant notes, Defendant raised the issue of standing in its Response to Plaintiff's Motion and Memorandum for Partial Summary Judgment.

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II. RLUIPA

RLUIPA provides in pertinent part as follows:

Sec. 2 Protection of Land Use as Religious Exercise

(a) Substantial Burdens

(1) General Rule – no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

. . . .

(b) Discrimination and Exclusion –

(1) Equal Terms. – No government shall impose or implement a land use regulation in

a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

. . . .

(3) Exclusions and Limits. - No government shall impose or implement a land use regulation that –

(A) totally excludes religious assemblies from a jurisdiction;

or

(B) unreasonably limits religious assembly institutions or structures within a jurisdiction. (Emphasis added).

Plaintiff's allege in Count VII that the Ordinances in this case violate the subsections highlighted above.

A. Section 2(a)(I) Substantial Burdens/Compelling Governmental Interest/Least Restrictive Means

RLUIPA provides that "[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the

claim substantially burdens the plaintiff s exercise of religion." RLUIPA § 4(b).

Plaintiffs reargue that the exercise of their religion has been substantially burdened because "relocation (pursuant to the Surfside Ordinance) would significantly impede and impair many of Plaintiffs' Orthodox Jewish members, particularly elderly ones, who reside in the northerly side of Surfside and in neighboring Bal Harbour and Bay Harbor Islands, from walking to synagogue and participating in synagogue worship on Saturdays and Jewish holidays. . . ." Plfs. Memo. p. 15. In its 7/13/00 Order, this Court found that Plaintiffs had failed to prove a substantial burden, rejecting Plaintiffs' integrated "Surf-Bay-Bal" religious community argument. The Court adopts that discussion for purposes of these motions. *See* 7/13/00 Order pp. 22, 27.

Plaintiffs take issue with the Court's characterization of the "center of geographic Surfside," and again claim that "a substantial number of worshipers cannot walk to that district on the Sabbath and Jewish holidays." The Court reiterates its finding that the focus should be on the burden to members of the congregation-who reside in Surfside, and Plaintiffs have only presented evidence of four such members. Plaintiff suggest that they "need not provide testimony of every burdened member to establish its case, and have simply provided a cross-section of members to demonstrate this point." Plaintiff's direct the Court to the affidavits of Rabbi Caspar and Rabbi Elnecave, which, Plaintiffs argue, evidence "[t]he much larger overall percentage of walk-burdened individuals." However, those

affidavits do not reference the percentage of Surfside residents who are allegedly burdened.

Plaintiffs argue that every person has rights under RLUIPA, and this Court should not limit its inquiry to Surfside congregation members. The Court finds Plaintiffs' attempt to analogize liability in the instant case to a case in which a Bal Harbour resident living on 97th Street can sue Surfside for personal injury caused by Surfside's "release[s] of noxious fumes on 95th Street" to be inapposite. The situation Plaintiffs reference is based on a negligence theory, and associated duties, whereas the instant case is based on an Ordinance scheme which govern a municipality, and the residents and businesses therein.

It would be virtually impossible to require a municipality to ensure that every person will not be burdened by the walk to the temple of their choice, particularly with respect to members who live outside the municipality. Arguably, any person in any community surrounding Surfside could take that position, which, if Plaintiffs' logic is followed, would require Surfside to allow religious buildings in every zone. This Court again finds that an analysis which focuses on substantial burden to residents of the municipality at issue is appropriate in a zoning case. The Court notes that RLUIPA's legislative history contains language that the Act "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." *Murphy v. Zoning Commission of the Town of New Milford*, 148 F.Supp.2d 173, 184 (D. Conn. 2001) (citing 146 Cong. Rec. S7774-01, § 7776 (daily ed. July 27, 2000)).

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Plaintiffs cite language from *Lennart v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001), in which the Second Circuit stated that "the NYC Board's suggestion that any cognizable 'injury-in-fact' stops at the electoral district's edge misunderstands the nature of the plaintiffs' challenge to section 6-132(2). . . ." The Court notes that the issue that the *Lerman* Court was addressing was whether the plaintiff had standing to challenge the ordinance in question. This Court has found in this case that the Plaintiff temples do have standing to challenge sections which deal with their ability to locate in the business and tourist districts, and that they therefore have demonstrated an injury in fact as to those provisions. However, the Court has found that the Plaintiff temples cannot meet the substantial burden requirement by relying on the distance that non-Surfside resident congregation members must walk.

Plaintiffs attempt to argue that the substantial burden requirement is met because there is an impact on interstate commerce, citing to the provisions of RLUIPA § 2(a)(2). That section discusses the situations in which RLUIPA's prohibition against substantial burdens on religion applies (that is, it provides the requisite interstate commerce connexity requirement).[4] It does not, as Plaintiffs would have

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4. RLUIPA § 2(a)(2) provides that the compelling governmental interest/least restrictive means analysis applies in any case in which:

> (B) the substantial burden affects, or the removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(Cont'd)

it, state that establishment of an interstate commerce connection itself constitutes a substantial burden. Indeed, §2(a)(2) requires that the argued "substantial burden" must "affect," or the removal of the "substantial burden" must "affect" interstate commerce. Plaintiffs suggest that if the members cannot walk there, the temples will be forced to close, and that will affect interstate commerce. The Court finds several problems with this argument. First, the Court notes that this is the first time in these proceedings that Plaintiffs have made any claim that tourists, as opposed to several Surfside residents, and residents of nearby communities, are affected by Surfside's zoning scheme. Furthermore, Plaintiff's have cited no authority for the

(Cont'd)

> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property.

RLUIPA § 2(a)(2). In order to establish the requisite connection with interstate commerce, Plaintiffs have provided statistics in the affidavit Rabbi Isaac Menashy of Midrash, and Bernard Lack, Vice-President of Young Israel. Rabbi Menashy states that much of items Midrash has purchased to conduct services were purchased from out-of-state suppliers of Judaica books and religious articles, and that none are produced in Florida. Mr. Lack states that approximately 60% of Young Israel's members arc "tourists," mostly from the states of New York. New Jersey, Connecticut, Maryland and from Canada, various South American countries and Israel. Rabbi Menashy states that an unspecified percentage of Midrash's worshipers are "tourists," mostly from the states of New York and New Jersey and from various Latin American countries and Israel.

proposition that the burden on out of state tourists should be factored into substantial burden analysis. Finally, even if this were an appropriate consideration for the Court, Plaintiffs have made no showing that there are insufficient accommodations for tourists that are within a reasonable walking distance to the RD-1 residential district where they may locate as a conditional use.

Since Plaintiffs have failed to meet their burden of establishing a substantial burden, the issues of compelling interest and least restrictive means need not be reached.

B. §2(b)(1) - Equal Protection

Plaintiffs allege that §§ 90-151 and 90-152 of the Surfside Zoning Code violate the equal terms provision of RLUIPA, in that they allow private clubs and other secular places of public assembly in the tourist and business districts, but disallow churches and synagogues. Section 90-152(a), which governs the business district, permits a private club[5] above the first floor level, where Midrash is located, but prohibits churches and synagogues. Sections 90-152(b)(8) and (10) permit theaters and restaurants on the first floor of the business district, and § 90-152(b)(18) permits lodge halls, health clubs, dance studios, music instruction studios, modeling schools, language schools and schools of athletic instruction above the first floor level. Similarly, § 90-151,

5. Defined in ¶ 90-2(2) of the Code as "a building and facilities or premises owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily for service which is customarily carried on as a business."

which concerns the tourist district, allows private clubs as permitted uses, while specifically providing that "no churches or synagogues shall be permitted."

Defendant argues that this claim is also barred by the Court's findings in its 7/13/00 Order. In that Order, the Court found that Surfside's Zoning Code is facially neutral and that there was no evidence of discriminatory purpose or intent in the creation of that Code. 7/13/00 Order at 12-18. Defendant notes that the legislative history of RLUIPA "makes clear that section 2(b)(1) tracks free exercise equal protection analysis," citing 146 Cong. Rec. §§ 7774-01, 7775:

> Sections 2(b)(l) and (2) prohibit various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable. . .

Def. Mot. at 7. Defendant argues that because of the Court's prior findings as to neutrality and general applicability, Plaintiffs cannot succeed on their RLUIPA claim.

Plaintiffs respond that in its prior Order, the Court improperly found that the Ordinances were neutral because an examination of the facts surrounding their passage showed no discriminatory intent, rather than finding that the Ordinances are invaiid because discriminatory intent "can be inferred from the law's text, stated purpose, design and effect in operation." Plf. memo at 6. In *Church of the Lukumi*

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Babalou Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (hereinafter "*Lukumi*" the Court stated:

> Although a law targeting religious beliefs as such is never permissible, (citations omitted) if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral (citations omitted) and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. . . . To determine the object of a law, we must begin with the text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Id. at 533.

In its prior Order, this Court found that Surfside's Ordinance scheme, considered under *Lukumi*, as well as cases which stand for the proposition that the effect of zoning on churches and synagogues was "clearly secular," was a neutral ordinance scheme, both on its face, and after consideration of evidence offered in support of non-facial discrimination. The Court, in considering the ordinance scheme as a whole, found that "the zoning interests of Surfside may properly be characterized as compelling . . . it seems that the provision of a fairly centrally located area where churches or synagogues may locate nearly adjacent to the area in which the Plaintiffs desire to locate, meets this ephemeral test." Order at 28. The Court did not make a specific determination,

however, regarding Surfside's interests in distinguishing between permitted and non-permitted uses within a particular district, particularly, the business and tourist districts. For purposes of Plaintiffs' equal protection RLUIPA claim, the Court will discuss §§ 90-151 and 90-152, particularly with respect to Surfside's determination that certain non-religious institutions would be allowed in those districts, while churches and synagogues would not.

Initially, the Court, in keeping with the proposition that all statutes should be read in a constitutional manner, will construe § 1(b)(1) as being a codification of existing Equal Protection law. In so doing, the Court reads into that provision a requirement that the religious and non-religious entities referenced which must be treated equally must also be similarly situated in all relevant respects. To do otherwise would be to construe the statute in a manner which may favor religious institutions over non-religious institutions, in violation of the Establishment Clause. That being said, the Court begins its discussion of Equal Protection law and whether the Ordinances at issue violate that law, with the case of *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Supreme Court stated:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. (Citations omitted.) . . . The general rule is that legislation is presumed to be valid and will be sustained if the classification

> drawn by the statute is rationally related to a legitimate state interest, [citations omitted] When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, (citations omitted), and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy - a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. (Citation omitted.) Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.

Id. at 440-42.

In *Cleburne* the Court dealt with a city ordinance which allowed, *inter alia*, the following uses: "hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts." *Id.* at 437 n. 6. The ordinance further provided that "[h]ospitals for the insane or feebleminded, or

alcoholic [sic] or drug addicts, or penal or correctional institutions" were uses that required a special use permit. *Id.* The Plaintiff, the proposed operator of a home for the mentally retarded and others, filed a suit challenging the ordinance as unconstitutional under the Equal Protection Clause, both on its face and as applied.

The Court of Appeals for the Fifth Circuit found that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under the intermediate level, heightened scrutiny test. *Id.* at 437-38. On certiorari review, U.S. Supreme Court found that the Fifth Circuit erred in applying a heightened standard of review, and that the city only needed to show that the ordinance's distinction was rationally related to a legitimate governmental purpose. *Id.* at 444-46. The Court then examined the reasons behind the city's requirement for a special permit, as determined by the district court. *Id.* at 448. Because the Court determined that those reasons "[did] not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests," as opposed to other like facilities which did not house the mentally retarded, the court affirmed the lower court's finding that the ordinance was invalid as applied. *Id.* at 448.[6]

In *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the Eighth Circuit examined a city

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6. The Court determined whether the Ordinance was unconstitutional as applied particularly to the Plaintiff, as opposed unconstitutional on its face, "as the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. *Id.* at 447.

ordinance which provided zoning for the central business district (C-3), which was part of a "Downtown Revitalization Plan designed to preserve and restore the business district." *Id.* at 466. Permitted land uses in the C-3 zone included "commercial establishments, public and semi-public buildings, private clubs, second-floor apartments, parking lots and "[a]ccessory uses incidental to the foregoing principal uses." *Id.* Certain uses were also allowed under special permit, including "gas stations, drive-in establishments, creameries and small animal clinics." *Id.* The Ordinance did not mention churches. *Id.*

The Plaintiff church, which leased a building in the C-3 district, filed suit, focusing on the city's exclusion of churches from the C-3 zone. *Id.* The City had issued a resolution denying the Church's request to use the building which stated:

> The nature and timing of general church activities is in contrast to the business environment and to the business hours of the downtown. Therefore, no business or retail contribution or activity is generated[,] which is contrary to the intent of the C-3 zone and the goals and objectives of the Downtown Redevelopment Plan and the Hastings Comprehensive Plan.

Id. at 467. Additionally, "[t]he City Council also found no need to provide space for churches in the central business district because churches are allowed in the residential zones that comprise forty-five percent of the City." *Id.* The church challenged the city's policy of excluding churches from the central business district as Violative of its rights to free speech, freedom of association, free exercise of religion, equal protection and due process, and the district court granted summary judgment for the defendant on all claims. *Id.*

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The Eighth Circuit reversed that portion of the district court's order which dealt with the equal protection claim. The Court, citing *Cleburne* noted that the district court failed to deal with the "vital inquiry" as to "whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone," and that "[a]ny differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance." *Id.* at 471. The Court stated:

> The City is excluding the Church because it will not generate economic activity, but the Church has established a relevant similarity between itself and permitted non-commercial entities. It is now incumbent on the City to provide the rational basis for this apparent unequal treatment of similarly situated entities. The City has failed to support its exclusion of the Church with any justification beyond the conclusory statements in the affidavits of the city planners. (Citation omitted). Thus, summary judgment was not appropriate and the district court on remand should determine whether the City has a rational basis for treating the Church differently from the permitted entities. (Footnote omitted).

Id. at 471-72.[7]

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7. The Court also discussed the church's argument that a strict scrutiny analysis should be applied when examining the City's rationale, based on the statement in *Cleburne* that such standard would apply "when state laws impinge on personal rights protected by the Constitution." *Id.* at 472 n. 13 (citing *Cleburne*, 473 U.S. at

(Cont'd)

Appendix H

In a similar case, the Plaintiffs, a Reform Jewish Congregation and its Rabbi, alleged that the zoning laws of its Township violate the United States and Pennsylvania Constitutions because they prohibited houses of worship from locating in residential districts but allowed other institutions to locate there, by applying for a special exception. *Congregation Kol Ami v. Abington Township*, 161 F. Supp. 2d 432 (E.D. Pa. 2001), *reconsideration denied*, *Congregation Kol Ami v. Abington Township*, No. 01-1919, 2001 WL 827492 (July 20, 2001), *vacated*, *Congregation Kol Ami v. Abington Township*, 309 F.3d 120,130 (3d Cir. 2002). The court avoided the broader constitutional question of whether the ordinance was unconstitutional on its face, and examined whether prohibiting the Congregation to located on the property by special exception under the circumstances there presented was unconstitutional, applying a rational standard of review, as argued by the plaintiffs. *Id.* at 436.

After examining the reason put forward by the defendant, that is, that the Congregation was precluded from requesting a special exception because its "presence on the Property would cause traffic, light pollution, and noise to increase," the court noted that the zoning board failed to consider

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440). The Court found that "[a]bsent evidence of purposeful discrimination based on religious status, the rational basis standard should apply. The disparate impact of an ordinance on the Church is insufficient to support an inference of discriminatory purpose, (citation omitted), particularly in light of the City's efforts to accommodate the Church." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

whether any of those disruptions warranted the denial of a special exception, and that the board failed to specifically address Plaintiffs request for a special exception because it determined that the Ordinance did not specifically allow for one. *Id.* The court also noted that some of the other uses allowed to request a special exception would raise those same concerns, yet they were allowed to request the exception. *Id.* at 437. Based on these findings, the court ruled that the defendants denied plaintiff s constitutional rights and granted a motion for partial summary judgment.

On rehearing, the defendants argued that in *Cleburne*, the Supreme Court found the ordinance at issue to be unconstitutional as applied because it found that the ordinance treated a home for the mentally retarded differently because of prejudice. *Congregation Kol Ami v. Abington Township*, No. 01-1919, 2001 WL 827492 (E.D. Pa. 2001 July 20, 2001). Defendants claimed that because the district court did not determine whether discrimination played a role in the decision to deny the Congregation's request for a special exception, *Cleburne* was inapplicable. The District Court for the Eastern District of Pennsylvania disagreed, noting that in *Cleburne*, "[a]lthough the Court did say that requiring Featherston to request a permit 'appears to us to rest on an irrational prejudice against the mentally retarded,' the Court did not base its holding only on that speculative statement." *Id.* at *2 (citing *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1360 (6th Cir. 1992) ("the Court in *City of Cleburne*, reviewed each justification advanced by the city for its different treatment of group homes for the mentally retarded, and found them inadequate to establish a rational relationship").

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With respect to the case before it, the court stated:

> Here, the Township and the Zoning Hearing Board did not even consider Kol Ami's request for a special exception, and thus failed to offer any rational reason to preclude Kol Ami from requesting one. Additionally, the ordinance fails to articulate any reason why a house of worship may not request one, but the other uses, namely a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, and country club may request one.

Id. at *2. The Court further stated that assuming the Township's expressed goals (promoting health, safety, welfare and convenience and "organiz[ing] and coordinat[ing] the relationships between land use patterns") to be legitimate, the Township "has not offered any reason for precluding Kol Ami from requesting a special exception, but not the other uses." *Id.* at *2. The Court found that the Township could not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.*[8]

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8. The Court further rejected the defendants' argument that its opinion violated the Tenth Amendment and the Establishment Clause. With respect to the Tenth Amendment, the Court noted that it had merely applied Equal Protection Clause to the ordinance, and further that it did not "endorse" the Reform Jewish tradition, but rather merely concluded that the Congregation should be treated like the other uses allowed to request a special exception. *Id.*

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As is the case with the B-1 zoning ordinance, the ordinance at issue did not allow places of worship to apply for a special exception. The Court stated:

> Defendants attempt to excuse their failure to consider plaintiffs' request for a special exception by staying that the ordinance does not permit places of worship to apply for one (footnote omitted). That contention only adds fuel to the unconstitutional fire. It reinforces the Township's failure to offer any reasons to support its decision. There can be no doubt that the uses currently allowed to request a special exception under the ordinance cause traffic, noise and light pollution. Because the ordinance does not allow Kol Ami to request a special exception, and because the Township failed to consider Kol Ami's request for one, and failed to apply the ordinance in a way that accounts for the ordinance's differing treatment of Kol Ami, the ordinance remains unconstitutional as applied to Koi Ami.

Id. at *3. The Court therefore reaffirmed its prior findings, and remanded the plaintiffs' application for a special exception to the Zoning Hearing Board. *Id.* at *5.

Defendant appealed, and the Third Circuit did not decide the case until after the Zoning Hearing Board had held a special exception hearing and had allowed the use by the Congregation, with some limitations. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 130 (3d Cir. 2002). After first finding that the issue was not moot, the Third Circuit

vacated the district court's order and declared the land use permit null and void. *Id.* at 144. The Court based its decision on the fact that the lower court had not required the plaintiff to make a showing that it was similarly situated to the uses with respect to which it claimed it was not being treated equally. Rather, the court found, the district court had focused only on the issue of whether the uses had the same impact on the land, and because it found that they did, further found the ordinance in violation of the statute. *Id.* at 138. The Third Circuit stated:

> To be sure, it may be that an inquiry into whether something is "similarly situated" will involve an inquiry into whether the two entities have the same impact. But the analysis for equal protection purposes is more nuanced. In *City of Cleburne*, for example, the nature of the uses was dwellings for large numbers of people. In this case, a court must evaluate not only the impact of the Congregation as compared with a country club, the example raised by the Congregation at oral argument, but also what requirements or needs it may have in order to operate within the neighborhood. Should the Congregation prevail, the burden then shifts to the Township to offer any evidence of a rational reason for distinguishing between the uses.

Id. at 139. The court remanded to the district court for a resolution of the similarity of use issue. *Id.* at 143.[9]

9. The Third Circuit found that although "the Supreme Court has not yet directly addressed the constitutional incidents of municipal

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In the instant case, the Court finds that there are issues of fact with respect to whether plaintiffs are "similarly situated" to a private club, or any other non-commercial uses with respect to which they claim they are being treated unequally. Assuming Plaintiffs can prove that they are similarly situated, there are also issues of fact as to Surfside's rationale for allowing non-religious assemblies/institutions to locate in the business and tourist districts, while excluding religious assemblies/ institutions. Therefore, summary judgment on this portion of the RLUIPA claim would be inappropriate.[10]

C. §2(b)(3) – Unreasonable Limitations on Religious Assemblies

Plaintiffs argue that Surfside's Ordinance scheme "unreasonably limits religious assembly institutions or structures" in violation of § 2(b)(3)(B), because it "prohibits

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restrictions on use of land by religious institutions, (footnote omitted), its application of the rational basis test in cases involving other alleged liberty restrictions by municipalities exercising land use authority suggests" that the "rationally related" standard was the correct standard to apply. *Id.* at 133-34 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

10. To the extent that Plaintiffs additionally allege that §§ 90-149 and 90-41, which concern the RD-1 residential district and the procedure to obtain a conditional use violate this section because they "require churches and synagogues, but not private clubs or other secular places of public assembly, to undergo a burdensome, conditional use licensure process," (Third Am. Cmpl. ¶ 128) the Court has already found that Plaintiff does not have standing to contest these sections.

churches and synagogues in seven of eight zoning districts, including Surfside's commercial and multi-family districts, and permits them only in one two-family district and only upon Surfside's prior approval of a conditional use permit pursuant to an unreasonable, onerous and open-ended process, subject to the whim and caprice of the Town Commission."[11] Plaintiffs further argue that because the ordinance provides that the application "shall be made by the owner of the subject property," it is unduly burdensome for prospective purchasers or renters to apply. Finally, Plaintiffs argue that the ordinance lacks objective standards and allows the Town Commission to make "individualized assessments of the proposed uses for the property involved."

This Court rejects Plaintiffs' arguments on several grounds. First, as noted in the 7/13/00 Order, it is undisputed that Plaintiffs never sought to utilize the permit process, and therefore have suffered no injury. Furthermore, the Court also recognized that a conditional use "is generally permissive" and not unreasonable and that

> [t]here is no evidence on the record of any denials to churches, synagogues, or other religious institutions of the Conditional Use Permit required by §90-41. Moreover, there is no indication in

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11. §90-41(b) provides that a permit "shall only be granted where it has been clearly shown that the public health, safety, morals, and general welfare will not be adversely effected . . . and that necessary safeguards will be provided for the protection of the surrounding property."

> either the statute or the legislative history that such fears would be well founded.

7/13/00 Order at. 9. Finally, Plaintiffs' unreasonableness argument is rejected for the reasons discussed in the section regarding compelling interest and least restrictive means in this Court's 7/13/00 Order.[12]

IV. Conclusion

Based on the foregoing analysis, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Town of Surfside's Motion for Summary Judgment on Plaintiffs' Third Amended Complaint's "Seventh Claim for Relief" is hereby **GRANTED** except as to Plaintiffs' claim that Surfside's zoning code violates § 2(b)(1) of RLUIPA; as to that claim the Motion is **DENIED**.

2. Plaintiff's Motion for Summary Judgment on Count VII of the Third Amended Complaint is hereby **DENIED** in all respects.

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12. Because the Court finds that Plaintiff is not entitled to relief under RLUIPA on summary judgment based on other legal grounds, or because there remains issues of material fact, the Court declines to address the constitutionality of the statute. *See Lyng v. Northwest Indian Cemetery Prot. Assn*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

DONE AND ORDERED this 2d day of January, 2003 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX I — ORDER RE: FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED JULY 17, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-1566-CIV-UNGARO-BENAGES/BROWN

MIDRASH SEPHARDI, et al.,

Plaintiffs,

vs.

TOWN OF SURFSIDE,

Defendant.

ORDER RE: FINAL SUMMARY JUDGMENT

THIS MATTER is before this court on Defendant Town of Surfside's Motion for Summary Judgment and on Plaintiff Midrash Sephardi's and Plaintiff Young Israel's Cross-Motion for Partial Summary Judgment. This court has reviewed the motions, the responses, the replies, and the pertinent materials in the file.

PROCEDURAL HISTORY

On July 9,1999, Plaintiffs filed a Verified Amended Complaint, which raised nine claims for relief, in addition to a request for injunctive relief. Defendant filed a Motion

for Summary Judgment on all counts. Plaintiff's Reply Memo included a combined Motion for Partial Summary Judgement on Counts I, II, III, IV and IX (Free Exercise of Religion, Freedom of Speech and Assembly and Florida Religious Freedom Restoration Act). By leave of the Court, Plaintiffs filed a Second Amended Complaint on May 8, 2000. This complaint raised six counts: Free Exercise of Religion, Free Speech, Free Assembly, Unconstitutional Prior Restraint, Free Exercise and Equal Protection as Applied and the Florida Religious Freedom Restoration Act. These claims were substantively similar to those of the initial complaint with the exception of Count V, which raised an Equal Protection claim with regard to the Mogen David Synagogue, an issue not raised in the previous complaint. With that exception, the motions, which were filed as to the Verified Amended Complaint deal with the substance of the issues presented by the Second Amended Complaint. Accordingly, the Court will address the motions as they relate to the Second Amended Complaint.

FACTS

Plaintiff Midrash Synagogue ("Midrash") currently rents property located in a B-1 zoning district of Defendant Town of Surfside wherein churches and synagogues are prohibited. Plaintiff Young Israel Synagogue ("Young Israel") currently rents property located in an RT-1 tourist district where synagogues are also prohibited. Both are located on or near the border between Surfside and Bal Harbour and nearby to Bay Harbor Islands, on 96th Street. Both synagogues' congregants adhere to the tenets of Orthodox Judaism, which require that they walk to service both on Holy Days and on

Saturdays, their Sabbath; in order to participate in congregational worship. Both are currently operating in violation of the Surfside Zoning Ordinances.[1]

Midrash had applied for a Special Use Permit for the B-1 Zone, which was unavailing, due to both the non-permissive use therein and the requirement under the statute that Special Use Permits as well as zoning variances be applied for by the property owner, or alternately, by a tenant with written approval of the owner. Midrash then applied for a zoning variance, which was denied as the owner neither submitted the application nor gave his express written approval. Midrash has not applied for a Conditional Use as contained in the Ordinance. Young Israel has not applied for any permits, variances or Conditional Uses, and opened flagrantly in violation of the Ordinance.

The surviving official records of the town meetings regarding the Ordinance do not provide any great detail of

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1. There are a number of sections of the Surfside Zoning Ordinances that are at issue in this case, and they will collectively be referred to as "the Ordinance." Ordinance §90-151 delineates permitted uses in the tourist district, designated as RT-1, while §90-152 lists those permitted in the business district, designated B-1. Churches and synagogues are prohibited in both. They are a conditional use in the RD-1 two-family residential district, as stated in §90-147. Ordinance §9041 defines a Conditional Use as one which is appropriate if controlled as to number, area and location. That section also states the procedures for obtaining a conditional use, referring to the procedural requirements of §90-94. Ordinance §90-94 encompasses information pertaining the procedures and qualifications in obtaining a Special Use Permit. Other sections are primarily definitional and will be referred to within the body of the opinion.

the debate regarding the reasons behind its enactment. Hal Cohen, Former City Manager and David Cypen, City Attorney, were able to provide some unofficial recollections of the legislative history, but the majority of the recorded minutes of the meetings were destroyed. Apparently, in 1988 at an allegedly contentious hearing, the new Ordinance was enacted and an exception granted to "Shul," another synagogue which had pre-existed the Ordinance. The latest Comprehensive Plan 1995-2000, asserts Surfside's desire to improve its business and tourism districts through its comprehensive zoning plans.

Members of the congregations of both synagogues have given testimony that the inability to locate anywhere other than in the RD-1 district represents an inordinate burden on the congregants. Only three affidavits were presented by Surfside residents as to the burden this represented. The remainder of the affidavits were from congregants in the neighboring towns of Bal Harbour and Bay Harbor Isles.[2] All stressed the difficulties in walking the additional distance to the RD-1 district due to health, age or familial considerations.

DISCUSSION

I. Standard on Motion for Summary Judgment

A summary judgment is proper only if the record before the court shows that there is no genuine issue as to any

2. The overall congregation of the synagogues is largely comprised of members of the outlying communities, as is the congregation of other religious establishments in Surfside.

material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The purpose of summary judgment is "to pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court held that summary judgment should be entered only against

> a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23.

In order to prevail, the moving party must do one of two things: (1) show that the nonmoving party has no evidence to support its case, or (2) present "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *United States v. Four Parcels of Real Property*; 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc);

Young v. City of Augusta, 59 F.3d 1160, 1170 (11th Cir. 1995). In making this determination, the court should consider all of the evidence in the light most favorable to the nonmoving party and with all reasonable inferences drawn in favor of such party. *Dibrell Bros. International. S.A. v. Banca Nazionale Del Lavoro*, 38 F.3d 1571, 1578 (11th Cir. 1994).

If the movant successfully discharges this initial burden, the burden shifts to the non-movant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the non-movant's case. *Young*, 59 F.2d at 1170. The non-moving party must do more than rely solely on its pleadings, and simply show that there is some metaphysical doubt as to the material facts: *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87. If the non-moving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations, then the Court must enter summary judgment in the moving party's favor. *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989); *Johnson v. Fleet Finance. Inc.*, 4 F.3d 946, 949 (11th Cir. 1993). A genuine issue of material fact does not exist unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Ritch v. Robinson-Humphrey, Co.*, 142 F.2d 1391,1393 (11th Cir. 1998); *EEOC v. Amego*, 110 F.3d 135,143 (1st Cir. 1997); *Thornton v. E.I. Du Pont De Nemours and Co., Inc.*, 22 F.3d 284, 288 (11th Cir. 1994).

Furthermore, the mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. *Anderson*, 477 U.S. at 247. An issue of fact is material if it

"might affect the outcome of the suit under the governing law". *Western Group Nurseries. Inc. v. Ergas*, 167 F.3d 1354, 1359 (11th Cir. 1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a general issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989). However, "if facts and inferences overwhelmingly favor one party, such that reasonable people could only arrive at one verdict, then motion for judgment as a matter of law should be granted" *Williams v. Dresser Industries Inc.*, 120 F.3d 1163,1167 (11th Cir. 1997), *reh'g denied en banc*, 136 F.3d 1333 (11th Cir. 1998).

In the instant case, there are no issues of material fact to be determined, except as noted below with regard to Count V. Therefore, as to the remaining counts, the issues will be determined as a matter of law.

II. Standing and Other Prudential Concerns

The threshold determination is whether the Plaintiffs have standing to bring this suit. Federal courts may not exercise jurisdiction in the absence of an actual case or controversy. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). A party seeking to invoke federal jurisdiction must demonstrate: (1) an injury in fact that is distinct and palpable, or an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not abstract, conjectural or hypothetical; (2) a direct causal relationship between the injury and the

challenged action of the defendant; and (3) the likelihood of redressability as a result of a favorable ruling for the plaintiffs. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992); *Allen v. Wright*, 468 U.S.. 737, 752 (1984); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-2 (1976). These are the "irreducible minimum" required by the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464; 472 (1984). In order to make a determination of whether standing exists, the court must focus on the qualifications of the party bringing the suit rather than the underlying merits of the case. *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990).

Standing has generally been recognized in cases like this one, where the plaintiff has applied for and been denied a permit or exception. *See, e.g. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983) (holding that standing is present where a congregation challenged an ordinance after being denied an exception); *Messiah Baptist Church v. County of Jefferson. State of Colorado*, 859 F.2d 820 (10th Cir. 1988) (stating that, church had standing where it was denied a Special Use Permit); *Islamic Center of Mississippi. Inc. v. City of Starkville, Mississippi*, 840 F.2d 293 (5th Cir. 1988) (stating that where a mosque was denied a permit for use of a building as a religious center it had standing).

In *Love Church*, the City of Evanston required that all churches apply for a Special Use Permit anywhere within

the city in order to comply with a local Zoning Ordinance.[3] The plaintiff, a Pentecostalist church, never applied for a Special Use Permit, nor did it lease property that would call the implementation of the ordinance into effect. The plaintiff offered an affidavit stating that it was unable to rent suitable property. There was no evidence of any particular landlords who refused to rent, although the pastor of the church asserted that he had tried to rent four properties which were unsuitable. The Court held that this did not, "demonstrate a distinct or palpable injury for purposes of establishing standing." 896 F.2d at 1085; *see also C.L.U.B. v. City of Chicago*, 1996 WL 89241 (N.D. Ill. Feb. 27,1996) (holding that churches that failed to apply for a Special Use Permit lacked standing due to the absence of an injury-in-fact). In the case at bar, there is no evidence on the record that the Plaintiffs made any attempt to apply for a Conditional Use permit as required in Surfside Ordinance §90-41, or even attempted to lease property in the area covered by the challenged ordinance (zoned RD-1). Without any efforts to do so, Plaintiffs' contentions regarding unsuitability and burden need not be reached.[4]

Although Midrash applied for a Special Use Permit under §90-94, the application was rejected, since §90-94 does not

3. The same permit was required for libraries, museums and art galleries. 896 F.2d at 1083.

4. Plaintiffs also claim jurisdiction under the Federal Civil Rights Act, 42 U.S. §1983. However, the standing requirements for such a claim are no different than for any other Constitutional challenge, so no further analysis need be undertaken. *See Los Angeles v. Lyons*, 461 U.S. 95 (stating that to invoke federal jurisdiction under §1983, a plaintiff must satisfy standing requirements).

allow for churches or synagogues as a Special Use, and the Town Commission would first have to grant a zoning variance. Plaintiffs are not eligible to file for a zoning variance themselves as they are only renters/lessees of the currently occupied properties; therefore their request for a variance was returned to them.[5] Even viewing the evidence on the record in a light most favorable to the Plaintiffs, Rabbi Elnecave's testimony that the synagogue had received some sort of unofficial go-ahead to locate in the H-1 zone upon the filing of some papers is irrelevant, since the landlord would have had to apply for any variance or exception on its behalf, and there is no evidence to suggest he did so. *Elnecave Affidavit*, ¶16. In fact, by Plaintiffs' own admission, papers were never filed in accordance with the constraints so clearly delineated in the Ordinance for either the Special Use Permit or the zoning variance, and no attempts were made to procure property in the RD-1 zone.

The Seventh Circuit Court of Appeals has held that it is not always necessary to make an application for a permit in order to establish standing. *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980). However, in *Entertainment Concepts*, the court held that a party must "reasonably assert that it fears enforcement" in order to

5. The Town of Surfside Statute §90-58(7) in pertinent part requires "(a)pplications for rezoning shall be made by the fee titleowner of the property or by a tenant . . . with the owner's written permission." (emphasis added). The same procedure applies with regard to applications for both Special and Conditional Uses. *Id.* at §90-58 (8). Therefore, Plaintiffs lack the standing to even apply for either a permit or a variance under their current circumstances, much less to challenge the constitutionality of the ordinance on this basis.

maintain standing. *Id.* at 500. There is no evidence on the record of any denials to churches, synagogues or other religious institutions of the Conditional Use Permit required by §90-41. Moreover, there is no indication in either the statute or the legislative history that such fears would be well-founded. The only basis the Plaintiffs may have for their concerns is generic in nature, without grounding to any particularized claim of historic enforcement of the challenged provision. *See Love Church*, 896 F.2d at 1085. However, the Plaintiffs also claim that they need not have applied for a permit as the ordinance in question is an unreasonable prior restraint.

The Eleventh Circuit held in *Lady J Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) that an ordinance can act as a license, serving as an unreasonable prior restraint, if it requires a "zoning exception." *See also Freedman v. State of Maryland*, 380 U.S. 51 (1965) (holding that standing exists to challenge on the grounds that an ordinance delegates an overly broad licensing authority to an administrative official). Plaintiffs argue that "the indispensability of the conditional use permit renders it the equivalent of a license;" citing to *Lady J* as supporting the proposition that the "ordinance is unconstitutional because it channels all houses of worship through a conditional use process. . . ." Plaintiffs Memorandum of Law at 18. However, the ordinance in *Lady J* called for a zoning exception for adult businesses, a non-permissive use.[6] *Id.* at 1361.

6. *Lady J* and most of its progeny are cases that deal with adult entertainment facilities. *See, e.g., Blue Moon Enterprises v. Pinellas County*, 2000 WL 622091 (M.D. Fla. May 10, 2000) (allowing facial

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Appendix I

In the case *sub judice* the challenged ordinance requires an "approval of a conditional use." Ordinance §90-41, Unlike an exception, a Conditional Use is generally permissive within the specified zone, but due to potential incompatibility with other uses, requires legislative approval before being put to that use. *Elam v. Albers*, 564 P. 2d 14 (Col. App. 1980). Unlike a nonconforming use, a Conditional Use is permitted by zoning regulations, but because of possible incompatibility, a special permit is required. *County of Imperial v. McDougal*, 564 P.2d 14 (Cal. 1977). Moreover, "[p]ermitted and conditional uses are distinguishable from variances. . . ." *National Heritage v. Pritza*, 728 P. 2d 737 (Colo. App. 1986); *see also Harding v. Board of Zoning Appeals*, 219 S.E. 2d 324 (W. Va. 1975) (stating that a conditional use is not a variance). According to written memorandum by Consulting Engineer Jack Luft, submitted on behalf of the Town, "[z]oning codes distinguish between conditional uses and special use exceptions by treating conditional uses as presumed to be compatible . . . [and the requirements] are no different than any other project must satisfy except that greater detail is initially provided." Luft Memorandum, pp. 4-5.

Although the definition contained in §90-2(21) is somewhat ambiguous,[7] §90-41 of the ordinance in question

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challenge to restrictions on adult establishments as a licensing scheme). A smaller portion involve claims restricting protesters to specific locations. *See, e.g., U.S. v. Frandsen*, 2000 WL 679170 (11th Cir. May 25, 2000) (allowing facial challenge to permit regulation prior to demonstrating in national park).

7. The Surfside Ordinance, §90-2(21) defines a Conditional Use as "any use . . . which would not be appropriate generally or without (Cont'd)

is analogous to the traditional definition of Conditional Use, and readily distinguishable from the exceptions-based licensing scheme cited by the Plaintiffs. Therefore, the prior restraint standing granted in Lady J is not applicable to the case at bar; and the more stringent standards generally associated with federal questions preclude standing.

There are additional prudential concerns regarding ripeness of the claim. Plaintiffs argue that if they fail to succeed on this matter, they would be forced to apply for a Conditional Use anyway, and therefore should be able to litigate their claim. Plaintiff's Reply Memorandum of Law p.5. This theory is totally inconsistent with the Plaintiffs' other arguments. Moreover, "[a] lack of ripeness inheres in the fact that the need for some further procedure, some further contingency of application or interpretation . . . serve(s) to make remote the issue which was sought to be presented to the Court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 51 (1976). Because the Plaintiffs' argument requires the very contingencies announced in *EKWRO*, this argument fails on ripeness grounds.

III. Merits of Individual Claims

Assuming arguendo that the Plaintiffs do have standing to proceed in Federal Court, they raise three Constitutional claims tied to the First Amendment. They proceed under a

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(Cont'd)

restriction throughout a particular zoning district, but would be appropriate if controlled as to number, location, or relation to the neighborhood." Ordinance §90-41 provides for legislative approval of the Conditional Use by the Town Commission.

Free Exercise Clause theory, a Freedom of Speech theory, and finally under a "hybrid" claim which is derived from *Employment Div., Department of Human Resources of v. Smith*, 494 U.S. 872 (1990). Additionally, in Count V, Plaintiffs claim an Equal Protection as applied violation regarding the Mogen David Synagogue.[8] Finally, Plaintiffs state a claim for relief under the Florida Religious Freedom Restoration Act.

A. Free Exercise Clause

Although "Congress shall make no- law respecting the establishment of religion or the free exercise thereof . . . ," U.S. CONST. amend. 1, the right to the free exercise of religion does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability. *Smith*, 494 U.S. at 879. A law that is religion neutral and of general applicability with only an incidental effect on religious practice need not be justified by a compelling government interest. *Id.* Conversely, "[a] law failing to satisfy the Smith requirements of neutrality and general applicability must be justified by a compelling government interest." *Church of Lukumi Babalu Ave. Inc. v. City of Hialeah*, 548 U.S. 520, 531 (1993). The first question to be answered is whether Surfside's Ordinance is indeed neutral and of general applicability.

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8. Count Five, Equal Protection as applied relating to the Mogen David Synagogue is not addressed in either Motion for Summary Judgment. The Court is unable to resolve this question within the confines of the pleadings and motions.

Appendix I

1. Neutrality and General Applicability

In order to be a neutral law, the ordinance must go no further than to regulate the location of churches and synagogues, and must not regulate actual religious tenets. Courts have generally held that location is a preference, and is not comparable to religious belief or conduct. In *Lakewood. Ohio Congregation of Jehovah's Witnesses, supra*, a municipal zoning ordinance prohibited the use of buildings as churches in virtually all residential districts.[9] In affirming a lower Court decision upholding the challenged ordinance, the Court stated that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs." 699 F.3d at 307; *see also Grosz v. City of Miami Beach*, 721 F.3d 729, 733 (11th Cir. 1983) ("*Grosz I*") (stating that the effect of zoning on churches and synagogues is "clearly secular"); *Christ College. Inc. v. Board of Supervisors. Fairfax County, Va.*, 944 F.2d 901 (5th Cir. 1997) (holding that the desire to locate on a particular property is a preference); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (holding that building a church on a particular site is not intimately related to religious tenets; at most it is a preference). It would appear that facially, the Surfside ordinances at issue are neutral and fall within the spectrum presented by the above cases. However, Plaintiffs maintain that the laws are not neutral as they are specifically aimed at religion "in an effort to suppress and infringe upon church and synagogue worship and religious study . . . and to subject

9. This is arguably a more substantial burden than in the case at bar, as churches in residential neighborhoods have traditionally been accorded a favored status. 83 Am.Jur.2d §438 (1992).

religious worshipers to unequal treatment before the law." *Pls.' Second Am. Compl.*, pp. 28 29.

In *Lukumi*, *supra*, the Court stated that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." 508 U.S. at 523. That is, the Court would not accept a regulation wherein secular ends were applied only to conduct motivated by religious beliefs. In *Lukumi*, the plaintiffs were members of the Santeria religion, which utilizes animal sacrifice as part of its ritual. After the church leased land in Hialeah, the city responded by passing a series of Resolutions and Ordinances. The Resolution at issue specifically spoke of residents' concerns over such irregular religious practices, while the Ordinances prohibited animal cruelty as related to ritual sacrifice. The Court found that the Ordinances were not neutral and hence were unconstitutional. In reaching this decision, the Court found that relevant evidence included the historical background of the decision, the specific series of events leading to the enactment, and the legislative history, all bearing on the question of discriminatory intent. *Id.* at 530-31. The minutes of the public records of the Council meetings related to the passing of the legislation revealed a vehement anti-Santeria basis behind its passage, reflecting a desire to suppress the religion. *Id.* at 541-42. Therefore the Court was able to declare that the ordinances failed the neutrality test.

Another case where discriminatory intent can be plainly seen is *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995). In *LeBlanc*, a group of Orthodox Hasidic Jews claimed

that the Village of Airmont was incorporated strictly to accomplish an impermissible religious gerrymander through its zoning codes. Prior to incorporation, the Ainmont area was an unincorporated area, represented through a quasi-civic group, the ACA. Transcripts of meetings of the ACA and the incorporation debates show that the incorporation and subsequent zoning laws enacted were due strictly to the anti-Hasidic attitudes of the leaders involved, as reflected in their public statements. *Id.* at 418-19. The Court found that the "motivation behind the enactment was discriminatory animus towards Orthodox and Hasidic Jews." *Id.* at 431. As in *Lukumi*, the court was engaged in an effort to "survey meticulously the circumstances of government categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Commission of New York City*, 397 U.S. 664, 696 (1970) (Harlan J., concurring).

In applying the standards of Lukumi to the instant case, there is insufficient proof in the record. In a summary judgment proceeding, all reasonable doubts should be resolved in favor of the non-movant, who then has a duty to present affirmative evidence to defeat the motion. *Mercantile Bank & Trust Co. v Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Even viewing the evidence in a light most favorable to the Plaintiffs, there is no testimony presented showing a discriminatory intent regarding the zoning ordinances save for the deposition of Hal Cohen, the former Town Manager. Even this deposition reveals little more than the Town's disfavoring of churches and synagogues in particular zones. As a matter of law, the statements referred to by Cohen in his deposition, such as "the Commission does not want any churches or synagogues in that area or anywhere

else in RM-1" and "[t]hey said it was a totally inappropriate use in that district . . ." (Cohen depo, pp. 4-5), fail to rise to the level of Lukumi, where there were statements on the record that revealed the official position of the City that contravened the Churches's First Amendment rights. In assessing "the contemporaneous statements made by members of the decision making body," the *Lukumi* Court relied on representations made on the record, and evidenced either through the written or recorded minutes of the council meetings. 508 U.S. at 2231. *LeBlanc* similarly contains statements made as part of the public record as direct as "the reason of forming this village is to keep people like you out of this neighborhood." 67 F.3d at 431. Even if Cohen's recollections are considered, they fail to rise to the direct level of discriminatory intent shown in these two cases. Moreover, "a municipal corporation speaks only through its records, not through opinion of individual officers." *Beck v. Littlefield*, 68 So. 2d 889, 892 (Fla. 1953); *see also United States v. O'Brien*, 391 U.S. 367, 383-4 (1968) (stating that it is too difficult to ascertain the City's true purpose if in fact its asserted justification is a pretext). Therefore, the lack of public utterances on the record dooms this argument.

Town Attorney Stephen Cypen opined that the tax implications might have been important to the town. PML 11. This is similarly irrelevant. This reflects nothing more than Cypen's opinion and was neither uttered contemporaneously nor as part of the public record. The fact that an amendment to restore churches and synagogues as a Permitted Use was defeated "at a contentious hearing" in September, 1988 also does not provide any evidence of discriminatory intent pertaining to this meeting, nor does the

fact that "the language in . . . §90-41 was subtly, but carefully, changed to classify churches and synagogues as conditional uses only. . . ." PML 12. Neither does the alleged comment made by Commissioner Novack to Commissioner Tourgeson that "[w]e don't want those people here" allegedly referring to Orthodox Jews. *PSAC* at 20. Again, this is not a comment that was made in the context of a public record of the proceedings. Similarly, there is no evidence in the record beyond Cohen's deposition that the Ordinance was enacted in response to any religious activity. Even accepting Cohen's statements that the Council rezoned because they thought a synagogue in the business zone was already illegal, this reflects little more than an attempt to clarify the existing ordinance, without any accompanying discriminatory intent.

A second and inter-related prong of the Smith test, is that the law must be one of general applicability. 494 U.S. at 879-81. Inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. *Lukumi*, 508 U.S. at 543. "The critical question is whether the circumference of legislation encircles a class so broad it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan J. concurring). In *Lukumi*, the ordinances clearly encompassed nothing beyond the Santerians. Likewise, in *LeBlanc*, the target of the ordinances was only the Orthodox Jews. In *Cornerstone Bible Church v: City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the court held that where churches were prohibited from a business zone, but other types of non-commercial uses were permitted, such as Alcoholics

Anonymous and a pregnancy counseling center, the law was not generally applicable.

In *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994), the Court examined a zoning ordinance that defined regulations for homeless shelters and indicated where they would be allowed. The Court found that this would be a law of general applicability, since it did not target only homeless shelters run by churches, and was motivated (at least facially) by a desire to address a general area of concern. *See also Daytona Rescue Mission v. City of Daytona Beach*, 885 F. Supp. 1554) (M.D. Fla. 1995) (stating that a law requiring rescue missions to apply for an exception regardless of whether they are a church is generally applicable). Moreover, in *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926), the Court held that there should be a legal presumption in favor of Constitutionality "if the validity of the legislative classification be fairly debatable." *Id.* at 392.

The text of the Surfside Ordinance is more analogous to the latter cases than the former. The text of the Ordinance provides that churches, synagogues, educational or philanthropic institutions (including museums), parking lots and garages, public and governmental buildings and public utility/public service uses are all Conditional Uses. §90-41(b) 1-5). This would fall within Justice Harlan's natural perimeter test, as this would apply to a group of secular and non-secular uses that "are of a public or semi-public character." §90-41(a). It should be noted that of the above list, only churches and synagogues are prohibited from the RM-1 multi-family zone. Further, "private clubs" are permitted in the B-1 business

district, despite the ostensible purpose of B-1 to "provide for the retail and personal service needs of the Town's residents and tourists. §90-152(a)(b). However, in *Schad v Borough of Mt. Ephraim*, 452 U.S. 1 (1981), the Court allowed that private clubs could be classified differently than houses of worship for zoning purposes. Private clubs, providing more of a social setting, provide more synergy for the shopping district in keeping with the purpose of §90-152. Therefore, these are laws of general applicability. Nonetheless, the Court will address the question of burden.

Under *Grosz I, supra*, the court arrives at the burden test through a slightly different path. The Court utilizes a test wherein 1) the law must regulate conduct, not belief; 2) the law must have a secular purpose; and 3) once these two tests are met, the Court must balance religious and governmental interests. *Id.* at 732-33. It is readily apparent that the challenged ordinance is regulating only conduct by establishing where religious institutions may be built. *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996) (holding that impact of denying permit to build in restricted zone is not upon religious belief); *Lakewood, Ohio Congregation of Jehovah's Witnesses*, 699 F.2d at 307 (stating that building a church is a 'desirable accessory of worship, not a fundamental tenet. . . ."). The secular purpose and effect test seems fairly easily met. There is no sectarian purpose evident in the Ordinance as discussed above, and the "essential effect" of the Ordinance does not negatively influence the pursuit of religious activity or expression. *Grosz I*, 721 F.2d at 733. That is not to say that there is no burden, but under *Grosz I*,

any indirect effect which results in a burden is analyzed as part of the balancing.

2. *Burden*

The final factor to be considered under either *Grosz I* or Lukumi is the burden to the Plaintiffs. The Court in *First Assembly of God* stated that at least on the particular facts of that case, the analysis would come out the same either way, although the Court preferred the *Grosz I* test. 20 F.3d at 423-24. This was largely due to the fact that the building of homeless shelters was hardly a central tenet of the religious belief in question in *First Assembly*, as distinguished from *Lukumi*, where the animal sacrifice was clearly central to the practice of Santeria. However, since there is a question of whether the conduct here is arguably central to the practice of Orthodox Judaism, the burden should be analyzed under both tests.

The determinative question is exactly what the burden on the Plaintiffs is. As stated in *Church of the Foursquare* and *Ohio Congregation*, the ability to build in a particularized area is not necessarily a significant burden on religion. In *Church of the Foursquare*, the court stated "[denying a variance] does not impose the forfeiture of a benefit or a penalty because of religious belief." 955 F.Supp. at 880. The court also noted that the church could "seek a special use permit for property elsewhere and there is little to suggest that such a request would be rejected." *Id.* at 881. Likewise, economic inconvenience, albeit not alleged here by Plaintiffs, is not enough to justify a substantial burden. *Islamic Center of Mississippi v. Starkville, Mississippi*, 840 F.2d 293

(5th Cir. 1989). In Christ College. Inc. v. Board of Supervisors. Fairfax County. 1991 WL 179102 (4th Cir. Sep. 13, 1991), the court suggested several ways in which Free Exercise could be burdened. Zoning laws could: absolutely prevent any property's use; curtail use of certain property having particular religious significance; and less likely, curtail particular uses having religious significance. *Id.* at *4. The court further stated that "there must at least be some nexus between the government regulation-here a zoning law-and impairment of ability to carry out a religious mission." *Id.*

It appears from the Plaintiffs' pleadings that the main burden of which they complain is that the members of the Synagogues would have to walk an inordinately long distance in order to comply with the prohibition on using motorized transportation on the Sabbath and Holy Days should they relocate to the Conditional Use area. There appears to be little dispute between the parties or in the case law that this represents a legitimate religious conduct concern. Def's Statement of Undisputed Material Facts ¶26; *see also Boyajian v. Gatsunis*, 2000 WL 490810 (11th Cir. Mass. May 3, 2000) (stating the necessity of Orthodox Jews to walk to services is a component of their religion). A Michigan case, *Congregation Dovid Ben Nuchim v. City of Oak Park*, 190 N.W. 2d 557 (Mich. Ct. App. 1972), is somewhat analogous. The Congregation brought a challenge to a zoning law prohibiting synagogues being built in several areas of the town, hence making it inconvenient for the members to walk to services. The Court acknowledged that this represented a burden on religion, and called it a substantial one, in light of the fact that at the time, case law was on the books in

Michigan which "accorded religion a favored status in our society," (citing *Roman Catholic Archbishop of Detroit v. Orchard Lake*, 53 N.W. 2d 308 (Mich. 1952)), and a state constitutional provision stating that religion was beneficial to the community. Mich. Const. of 1963 Art. 8 §1. Neither exists in the instant case. However, this case is significant to the extent that it identifies the overall legitimacy of the relationship between walking and religious conduct as it pertains to Orthodox Judaism.

The Plaintiffs cite *State ex al Anshe Chesed Congregation v. Bruggmeier*, 115 N.E.2d 65 (Ohio Ct. App. 1953) as another analogous case. In *Anshe*, the town denied a special use permit to the temple because a great majority of its members lived outside the town. In affirming the decision of the Court of Common Pleas for the town to issue the permit, the court did acknowledge that "the membership of a religious institution is not confined within municipal boundaries." *Id.* at 69. However, beyond the limited precedential value of the case, there are several distinguishing elements to the case at bar. First, as in *Archbishop of Detroit*, the plaintiffs had applied for a permit and been turned down. Second, in *Anshe*, the lot in question was literally on the border between two towns, with different driveways emptying out into different towns. Finally, in *Anshe*, the permit was denied specifically because of the large presence of out of town congregants.

Grosz I is a more instructive precedent. Since the City of Miami Beach did not totally prohibit religious activity in *Grosz I*, "appellees d[id] not confront the limited choice of ceasing their conduct or incurring criminal liability.

Alternatively, they may conduct the required services in appropriately zoned areas. . . ." *Id.* at 738. This is an important policy distinction in that it recognizes varying degrees of burden based on the difference between a burden entailing criminal liability, loss of livelihood or basic income as opposed to "convenience, dollars or aesthetics." *Id.* at 739. The greater the penalty, the more likely the court is to fend a substantial burden. This is clearly more valuable. both as an Eleventh Circuit case that "still has precedential value in this circuit," and as a closely analogous set of consequences. *First Assembly of God*, 20 F.3d at 423.

In the case at bar, the Plaintiffs would be free to apply for a Conditional Use in the appropriate zone, with the only burden being to the members of the congregation who would be troubled by the increased walk. In the affidavits submitted to the Court, only three members of the congregation from Surfside complained of the burden in the additional walk. The rest are from what has been termed by Plaintiffs the "Surf-Bay-Bal" area, comprised of Surfside, Bal Harbour and Bay Harbor. Aside from the *Anshe* case *supra*, there is no other case law to support what Plaintiffs have termed an "integrated religious community."[10] Significantly, the RD-1 zone is located near the center of geographic Surfside. The burden to residents of Surfside is actually less here than it might be were it placed in either the B-1 or RT-I zones.

10. This is the reverse argument of the court's holding in *Islamic Center of Mississippi*, 840 F.2d 293. There, the court held that the city's claim that the Muslim residents could go beyond the city limits to practice was unpersuasive, implicitly rejecting the integrated religious community argument and narrowing the issue to within its own borders.

Appendix I

Plaintiffs mistakenly focus on the burden imposed upon residents of neighboring municipalities in deeming 96th Street, located in the B-1 zone, as a central location. Geographically speaking, this is only true if one is trying to find the center of the so-called "Surf-Bal-Bay" area. It is located at the extreme northern end of Surfside itself. The inconvenience (or arguably burden) to residents of nearby communities is not a proper matter for consideration in determining the burden, if any, imposed by the Ordinance in the instant case.

In the case at bar, the burden to the Plaintiffs should be characterized as minimal, *Anshe* notwithstanding. Under *Lukumi*, the inquiry would likely end at that point, as there is not a sufficient burden to justify overturning a law that protects a significant government interest, as precluding churches and synagogues will add to the goals outlined in §§90-151(a) and (b) of providing facilities for shopping and convenience for tourists and residents. Further, religious institutions contribute little to the "synergy of retail shopping areas." *Luft Report* at 2. Therefore, the government's interest is strong, and even applying the *Grosz I* balancing test, the minimal inconvenience to the few town residents who are alleged to be suffering harm is outweighed by Surfside's interest in maintaining a viable economic base through the use of appropriate zoning regulations.

Appendix I

B. Freedom of Speech and Assembly

Additionally, Plaintiffs allege a violation of their First Amendment right of Free Speech. Plaintiffs agree (for the purpose of this motion only) that the regulations are content neutral. When zoning regulations do not exclude an organization entirely, but simply restrict its location, the ordinance is properly analyzed as a restriction on time, place and manner. *City of Renton v. Playtime Theaters. Inc.*, 475 U.S. 41 (1986). In *Renton*, such regulations were held valid if they are narrowly tailored to serve a substantial government interest, and allow for reasonable alternative avenues of expression. The City had made some areas available for the use of adult theaters while "preserving the quality of life in others . . . the essence of zoning." *Id.* at 54.

In the case at bar, Surfside similarly made some areas available for use of the synagogues, while preserving the intent of the zoning plan in others, which seems an exemplar of narrowly tailoring an ordinance to solve particular issues, since Surfside is not required to show that the ordinance was the least restrictive means of furthering its objective. *Ward v. Rock Against Racism*, 491 U.S. 41 (1986). The area of dispute arises in whether there are reasonable alternative avenues of expression. This dispute turns to some extent on the discussion regarding the validity of the Surf-Bay-Bal community discussed *infra*. Were that concept valid, then it might become a question of fact whether the locations allowed under §90.41 as Conditional Uses would be reasonable. However, since this theory has no grounding in the law, this test is easily met. *Bayou Landing Ltd. v. Watts*, 563 F.2d 1172 (5th Cir. 1987) (holding that a city can provide

that certain establishments may only operate in specified neighborhoods even in a First Amendment context). Moreover, the placement of the Conditional Use area in the geographical center of Surfside would actually lessen the burden on religious conduct as a whole, rather than placing it in a particularly convenient location for members of a particular congregation. The Ordinance provides for sites as an "ample alternative means of expression." *Cornerstone Bible Church*. 948 F.2d at 469. The Ordinance passes the *Renton* test, albeit barring acceptance of the integrated community theory.

Plaintiffs also cite *Lady J*, 176 F.3d 1358, discussed *supra* in the context of standing, as obviating the need for a *Renton* analysis. PML at 18. Plaintiff's maintain that the ordinance is a licensing scheme and therefore subject to a stricter scrutiny. As discussed *infra*, *Lady J* is readily distinguishable based on the permissive nature of the Conditional Use in the Surfside Ordinance. *Lady J* invalidated a zoning ordinance which allowed adult entertainment establishments in only one district on the grounds that the licensing ordinance that gives too much discretion to public officials, without precise and objective criteria, is invalid, and that licensing ordinances must require prompt decisions. *Id*. at 1358. A law subjecting exercise of Free Speech to prior restraint of a license, without narrow, objective, and definite standards to guide licensing authority is unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).[11]

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11. The Court somewhat qualified its holding in dicta by focusing on the fact of the maladministration of the ordinance. *Id*. at 158.

Shuttlesworth dealt with an ordinance requiring picketers or protest marchers to receive a permit from the Commission. The matter was left totally to the discretion of the Commissioners, and was therefore held unconstitutional. *Id.* at 153. *Lady J* involved a lesser degree of discretion, but was still held to be lacking in precise and objective criteria. The Court held that the amount of discretion exercised should not extend beyond the ministerial. *Id.* at 1362. However, the licensing ordinance in *Lady J* delegated decision-making authority to the Zoning Commission, an inferior body.[12] Indeed, many of the cases cited by Plaintiffs and by the Court in *Lady J* share the common thread of a non-legislative body making the decision, whereas the Town Commission of Surfside, a legislative body, acting upon the *recommendation* of the Zoning Board, makes the final determination in the case at bar. *See, e.g., City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 755-57 (1988) (stating that a regulatory scheme placing unbridled discretion in the hands of a government official (Mayor) was unconstitutional); *Freedman v. State of Maryland*, 380 U.S. 51 (1965) (holding that a statute was unconstitutional because it delegated overbroad discretion to an administrative official); *compare Church of Scientology Flag Serv. Org., Inc. v City of Clearwater*, 2 F.3d 1514, 1547-48 (11th Cir. 1993) (holding a city clerk's review of application for form was strictly ministerial in nature and sufficiently precise). This is an important distinction between the cases cited and the instant case.

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12. It is unclear from the facts on the record what the status of the Commission in *Shuttlesworth* was *vis a vis* elected or appointed status.

Therefore, beyond the fact that *Lady J* and its progeny are distinguishable as licensing schemes; the level of delegation provided to inferior bodies is likewise inapposite to the decisionmaking process in the Surfside Ordinance. There is no authority for proceeding to the merits of the claim based on a prior restraint "licensing scheme," and the *Renton* analysis squarely favors the Defendant. Therefore, Plaintiff's Freedom of Speech and Assembly claim does not pass muster.

C. Smith Hybrid Claim

Plaintiffs also claim a "hybrid" case of the type alluded to in *Employment Div., Dept. of Human Resources v. Smith*, *supra*. The *Smith* Court stated that "the only decisions to which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone . . . but in conjunction with other Constitutional protections. . . ." *Id.* at 881.[13] The Eleventh Circuit has not directly reviewed such a claim. However, in *Warner v. City of Boca Raton*, 64 F. Supp. 1272 (S.D. Fla. 1999), Senior District Judge Ryskamp expressed skepticism whether the Free Exercise versus hybrid claim is tenable. *Id.* at 1288; *see also Lukumi*, 508 U.S. at 567 (Souter J. concurring) (stating that "if a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule). Judge Ryskamp stated that "the Court does not read Smith to require strict scrutiny whenever a plaintiff presents a hybrid claim. Rather . . . [it] means only that the

13. The Court acknowledged that Smith itself was not such a situation.

City's Regulations must be analyzed under the Free Speech Clause as well as the Free Exercise Clause." *Warner*, 64 F. Supp. at 1288.

While there are cases in other Federal Circuits that utilize the hybrid approach, *Warner* is the only case within the 11th Circuit to discuss the ostensible hybrid exception, and its treatment seems dismissive, particularly since Judge Ryskamp acknowledges that the proposed exception was "dicta." *Id.* This Court declines to expand the hybrid exception into this jurisdiction, and does not speculate on the possible outcome were it do so, finding it sufficient to analyze the case under each category. Any expansion would seemingly subsume any constitutional litigation involving freedom of religion within its over-arching circle, as virtually any Freedom of Religion case could be seen as having at least an element of Freedom of Speech residing within its penumbra.

D. Florida Religious Freedom Restoration Act

Finally, Plaintiffs state a cause of action based on the Florida Religious Freedom Restoration Act (FRFRA). The FRFRA states that even a law of general applicability may not substantially burden a person's right to free exercise of religion unless it is furthering a compelling government interest and is the least restrictive means of furthering that interest. *Fla. Stat.* §761.03 (1999). There are serious issues regarding the Constitutionality of this statute. However, for the purposes of this analysis, Constitutionality will be assumed. This Court will not reach the issue of Constitutionality since "[i]f there is one doctrine more deeply

rooted than any other in the process of Constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936).[14] In practical terms, the Plaintiffs must first show a substantial burden, with the burden then shifting to the Defendant to show the compelling interest and least restrictive means. The analysis of the burden is much the same as in the Free Exercise discussion *infra*.

In *Warner*, the Court limited the definition of exercise of religion to that "which reflects some tenet, practice or custom of a larger system of religious beliefs. Conduct that amounts to a matter of purely personal preference. . . ." does not fall under the FRFRA. 64 F. Supp. at 1281. The burden in question can only be that falling on the walkers who would be inconvenienced by the zoning limitations. Again, the integrated religious community argument is unsupported by case law; therefore, the burden is slight, and affects few in the Surfside community. The claim that relocation to RD-1 would be a burden beyond walking due to the lack of available lots is speculative and unsupported factually, particularly since there is no evidence that Plaintiffs explored the possibility of leasing or purchasing property in this zone. *See Luft Memo.* pp. 3-6 (giving a detailed breakdown of some of the property conditions in this zone). Therefore, complaints

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14. However, Judge Ryskamp opens the door to a Constitutional analysis in *Warner*, quoting Justice Stevens's concurrence in *Bourne v. Flores*, 521 U.S. 507, 536 (1997) stating "[i]n my opinion, the [Federal RFRA] is a 'law respecting establishment of religion' that violates the First Amendment to the Constitution," as being representative of his views on the FRFRA.

arising under the FRFRA charging that the Conditional Use requirements are "vague and nebulous" cannot have foundation, as the Plaintiffs have admittedly never attempted to obtain a Conditional Use, and therefore can not show any non-speculative injury. *PRML* at 24.

Moreover, even if the inquiry continues, Surfside would have to show a compelling government interest. The power of a municipal government to regulate zoning is given great deference. *See, e.g., DHL Associates, Inc. v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999) (stating that the power of local government to zone and control land use is broad and its proper exercise is essential); *Schenk v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997) (same); *Western Presbyterian Church v. Board of Zoning Adjustment of D.C.*, 862 F. Supp. 538 (D.C. 1994) (stating that zoning laws are designed to protect the public from the offensive use of property). Therefore, implementing a zoning plan designed to further the synergy of a business district, while still allowing areas where churches are a permissive (albeit conditional) use is a part of this general police power.

On the facts of the case at bar, particularly the undisputed facts set forth in Defendant's Motion for Summary Judgment, ¶10-12, the Comprehensive Plan of the Town is to develop commercial and business uses in the designated zones, particularly in light of the sagging retail environment present with the recent loss of an anchor supermarket chain. *Luft Memo* at 2. Although many off-the-record allegations regarding possible ulterior motives are offered by Plaintiffs, they are not part of the official record, and hence not relevant to determining intent behind the Ordinance.

Ultimately, the question arises as to whether the Ordinance is indeed the "least restrictive means" of fulfilling the government interest. In keeping with the above discussion, with due consideration to the purposes of the Ordinance as set forth in the Comprehensive Plan, the zoning interests of Surfside may properly be characterized as compelling. There is no case law regarding the FRFRA that defines either "compelling interest" or "least restrictive means." However, it seems that the provision of a fairly centrally located area where churches or synagogues may locate, nearly adjacent to the area in which the Plaintiffs desire to locate, meets this ephemeral test. The only issue regarding the FRFRA is whether Plaintiffs have suffered a "substantial burden," and the Plaintiffs have failed to meet their burden of proof in this regard.

IV. Conclusion

Based on the foregoing analysis, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgement is hereby **GRANTED** on Counts One through Four and Count Six of the Second Amended Complaint.

2. Plaintiffs' Cross-Motion for Summary Judgement is hereby **DENIED** on all counts.

3. This case is removed from the trial calendar of August 28, 2000.

4. All pending motions are **DENIED** as moot.

5. The parties shall have twenty days from the date of this order to file Motions for Summary Judgment addressing Count Five.

6. If this is not done, as the Court finds factual issues for trial, the matter will then be rescheduled for trial.

DONE AND ORDERED this 13th day of July, 2000 at Miami, Florida.

s/ Stephen T. Brown
STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

APPENDIX J — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13858-CC

MIDRASH SEPHARDI, INC.,
YOUNG ISRAEL OF BAL HARBOR, INC.,

Plaintiffs-Counter-
Defendants-Appellants,

versus

TOWN OF SURFSIDE,
a Florida Municipal Corporation,

Defendant-Counter-
Claimant-Appellee.

On Appeals from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____) .

Appendix J

Before: WILSON and KRAVITCH, Circuit Judges, and GOLDBERG, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

(A)

Supreme Court, U.S.
FILED
DEC 6 - 2004
OFFICE OF THE CLERK

No. 04-469

IN THE
Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC. and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR RESPONDENT YOUNG ISRAEL OF BAL HARBOUR

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In The
SUPREME COURT OF THE UNITED STATES

No. 04-469

TOWN OF SURFSIDE,

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v.

MIDRASH SEPHARDI, INC. and
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MEMORANDUM FOR RESPONDENT YOUNG ISRAEL OF BAL HARBOUR

The first two Questions Presented by the Petition for a Writ of Certiorari in this case raise constitutional challenges under the Tenth Amendment and under the Establishment Clause of the First Amendment to Section 2 (the Land Use provision) of the Religious Land Use and Institutionalized Persons Act of 2002 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. No federal court of appeals has sustained a constitutional attack on the Land Use provisions of this law. And the Court of Appeals for the Eleventh

Circuit unanimously found Section 2 to be constitutional in the present case. The entire complement of active judges of the Eleventh Circuit concurred in this conclusion. Pet. App. J, p. 163a ("no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc . . . ."). In addition, the Eleventh Circuit explicitly sustained the constitutionality of Section 3 of RLUIPA in *Benning v. Georgia*, __ F. 3d __, 2004 WL 2749172 (11th Cir. Nos. 04-10979, 04-11044, December 2, 2004).

On October 12, 2004, the Court granted a Writ of Certiorari, however, to review Section 3 of RLUIPA – *i.e.*, the provisions relating to prisoners ("institutionalized persons") incarcerated for the commission of criminal offenses. *Cutter v. Wilkinson,* No. 03-9877. Although the petition for a writ of certiorari in that case refers only to the Establishment Clause of the First Amendment, the Brief for the United States in *Cutter* suggests that if certiorari is granted in that case "the respondent state officials would be free to raise a host of distinct constitutional challenges to RLUIPA as alternative grounds for affirmance." Brief for the United States, No. 03-9877, p. 9. The State of Ohio's Brief in Response in the *Cutter* case also urges the Court to "resolve all of the questions regarding RLUIPA's constitutionality in one round of review." Brief in Response, No. 03-9877, p. 14. These include a challenge to RLUIPA's validity under "the Spending and Commerce Clauses and Tenth and Eleventh Amendments." *Id.*, p. 16.

Section 2 of RLUIPA presents similar constitutional questions under the Establishment Clause to those raised in *Cutter v. Wilkinson,* No. 03-9877. The legislative history of Section 2, however, differs from that of Section 3. Section 2 was based on a record of widespread state and local discrimination against religious institutions by means of zoning regulations. 146 Cong. Rec. S7775 (daily ed. July 27,

2000) (joint statement of Sens. Hatch and Kennedy); see also H.R. Rep. No. 219, 106th Cong., 2d Sess. 18 (1999); *id.* at 24 (concluding that result of various forms of zoning discrimination "is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship"). And the constitutional challenges apart from petitioner's First Amendment claim also implicate different constitutional considerations when applied to Section 2 then when applied to Section 3.

The constitutional flaws that the Sixth Circuit found in Section 3 of RLUIPA are not present in Section 2. Granting to religious institutions land-use rights that are equal to those enjoyed by non-religious similarly situated groups does not have the effect of encouraging religion, which the Sixth Circuit in *Cutter* viewed as an impermissible consequence of Section 3. And interference with a local government's administration of its zoning laws differs in kind from interference with administration of its prisons.

The Court should not, we submit, issue a decision that affects the constitutionality of Section 3 of RLUIPA without considering the effect of such a decision on Section 2 of the same law. And if the Court considers constitutional challenges to RLUIPA apart from the Establishment Clause attack sustained by the Sixth Circuit in *Cutter*, its decision will have an effect on the constitutionality of Section 2.

The Court may, of course, hold this case on its docket until it decides *Cutter v. Wilkinson*, No. 03-9877. On the other hand, the Court may choose to grant certiorari in this case and set it for argument to follow *Cutter v. Wilkinson*, No. 03-9877. In order to enable the Court to arrive at a decision in this Term of Court, the respondent will expedite its briefing of this case.

Respectfully submitted,

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Dated: December 2004

(3)

No. 04-469

In the Supreme Court of the United States

TOWN OF SURFSIDE, FLORIDA, PETITIONER

v.

MIDRASH SEPHARDI, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

The United States intervened as a party in this litigation solely for the purpose of defending the constitutionality of federal law, pursuant to 28 U.S.C. 2403.* The United States therefore addresses only the following questions:

1. Whether the requirement, in the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, that government not impose or implement land use regulations in a manner that treats religious entities on less than equal terms than secular entities, 42 U.S.C. 2000cc(b), exceeds Congress's legislative authority under Section 5 of the Fourteenth Amendment.

2. Whether the requirement, in the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, that government not impose or implement land use regulations in a manner that treats religious entities on less than equal terms than secular entities, 42 U.S.C. 2000cc(b), violates the Establishment Clause.

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* The United States filed a separate brief as amicus curiae on certain statutory construction questions raised in the case. The United States' certiorari-stage filing as a respondent in this Court, however, is limited to the issues it participated in below as a party.

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In the Supreme Court of the United States

No. 04-469

TOWN OF SURFSIDE, FLORIDA, PETITIONER

v.

MIDRASH SEPHARDI, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 366 F.3d 1214. The opinions and orders of the district court (Pet. App. 56a-57a, 58a-59a, 60a-63a, 64a-67a, 68a-80a, 81a-93a, 94a-100a, 101a-126a, 127a-161a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2004. A petition for rehearing was denied on July 13, 2004 (Pet. App. 162a-163a). The petition for a writ of certiorari was filed on October 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, protection against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of RLUIPA applies to religious exercise in the context of land use regulation. 42 U.S.C. 2000cc. Section 3 of RLUIPA protects the free exercise of religion by institutionalized persons. See 42 U.S.C. 2000cc-1.

This case involves RLUIPA's land use provisions. Section 2(a)(1) of RLUIPA provides that no state or local government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc(a)(1). That restriction on governmental action only applies, however, in cases where

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or the removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian

tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. 2000cc(a)(2).[1]

RLUIPA's land use provisions also include a separate equal treatment provision, which prohibits state and local governments from imposing or implementing land use regulations "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. 2000cc(b)(1), or that "discriminate[] against any assembly or institution on the basis of religion or religious denomination," 42 U.S.C. 2000cc(b)(2). RLUIPA further provides that state and local governments shall not "impose or implement a land use regulation that * * * totally excludes religious assemblies from a jurisdiction; or * * * unreasonably limits religious assemblies,

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[1] If the only jurisdictional basis for applying RLUIPA is that the burden on religion affects "commerce with foreign nations, among the several States, or with Indian tribes," the provision still will not apply "if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-2(g).

institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(3).

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f). In enacting RLUIPA's land use provisions, Congress expressly invoked its authority under Section 5 of the Fourteenth Amendment, the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3), and the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1).

2. The private respondents, Midrash Sephardi and Young Israel of Bal Harbour, are two small Orthodox Jewish congregations located in the town of Surfside, Florida, which is a small, oceanfront community. Pet. App. 2a-3a. In addition to providing services on Holy Days and on the Sabbath, the congregations hold daily prayer sessions, and host various religious and social functions, community meals, lectures and group discussions, meetings on community welfare and public service activities, and singles events. *Id.* at 6a-7a. As adherents of the Orthodox Jewish faith, members of the congregations are required to walk to religious services on Holy Days and on Saturdays. The congregations thus need to be physically located within walking distance of their members. *Id.* at 7a.

The zoning code of the town of Surfside divides the town into various districts and delineates the permitted uses in each district. Churches and synagogues are not allowed as of right anywhere in Surfside. Pet. App. 3a-5a. Churches may be permitted as a "conditional use"

within the "RD-1" two-family residential district, *id.* at 3a-4a, but only if they "clearly show[] that the public health, safety, morals, and general welfare will not be adversely affected," *id.* at 4a n.2, and satisfy any other conditions for approval established by the zoning commission, *ibid.* Churches and synagogues are prohibited in every other district. *Id.* at 4a-5a, 128a-129a & n.1. While other entities may obtain a special use exception to locate in the business district, churches and synagogues are debarred from seeking such an exception. *Id.* at 5a n.3. In addition, while excluding religious assemblies, the Surfside zoning code permits secular private clubs and lodge halls to locate above the first floor in the business district. *Id.* at 4a-5a. The Code defines a "private club" as "a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." *Id.* at 29a (emphasis omitted).

For nearly a decade, Midrash Sephardi has been located in several rented rooms on the second floor of a bank in Surfside. The bank building is in the town's business district—with zoning designation B-1—in which churches and synagogues are prohibited. Pet. App. 5a, 128a. Young Israel originally leased its premises in a hotel located in the tourist district—with zoning designation RT-1—in which churches and synagogues are prohibited. *Id.* at 6a, 128a. Young Israel now shares space in the business district with Midrash Sephardi. *Id.* at 6a.

3. After petitioner initiated efforts to enjoin the continued operation of Midrash Sephardi and Young Israel, the two congregations filed suit alleging that petitioner's zoning scheme violates their rights under the

First and Fourteenth Amendments, as well as the Florida Religious Freedom Restoration Act of 1998, Fla. Stat. Ann. § 761.03 (West Supp. 2005). Pet. App. 9a, 157a. The district court granted summary judgment to Surfside on all but one of the constitutional and statutory counts. *Id.* at 127a-161a.[2]

Following the September 2000 enactment of RLUIPA, Midrash Sephardi and Young Israel amended the complaint to add claims under RLUIPA. Pet. App. 10a. The complaint alleged that petitioner's zoning ordinance and its implementation violated RLUIPA's prohibitions against (i) "impos[ing] or implement[ing] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. 2000cc(b)(1); (ii) "impos[ing] or implement[ing] a land use regulation that * * * unreasonably limits religious assemblies, institutions, or structures within a jurisdiction," 42 U.S.C. 2000cc(b)(3); and (iii) imposing a substantial burden on the free exercise of religion that is not in furtherance of a compelling governmental interest and accomplished by the least restrictive means, 42 U.S.C. 2000cc(a)(1). Pet. App. 16a, 24a, 105a-125a. After petitioner defended, in part, by challenging the constitutionality of RLUIPA, the United States intervened to defend the law pursuant to 28 U.S.C. 2403.

The court granted summary judgment to petitioner on each of the RLUIPA claims. With respect to the claim that petitioner failed to treat religious entities on

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[2] The one count concerned an allegation of disparate treatment between the respondent congregations and a different Jewish synagogue, see Pet. App. 94a-100a, a claim that is not at issue before this Court.

equal terms with other secular assemblies, the district court ruled that the private clubs permitted by petitioner are not similarly situated to churches and synagogues, because petitioner could reasonably conclude that, "on a general scale," religious assemblies do not "optimize 'cross-shopping behavior.'" Pet. App. 85a, 92a-93a. The court held, secondly, that the claim that petitioner unreasonably limited the establishment of religious entities within the jurisdiction failed because Midrash Sephardi and Young Israel had not applied for a conditional use permit within the residential district, and there was no record evidence indicating that such an application would be denied. *Id.* at 123a-125a. Finally, the court held that the congregations' "substantial burden" claim failed because the fact that some members of the congregation would be unable to walk to services if the synagogues were relocated to the residential district did not amount to a substantial burden on religion. *Id.* at 105a-110a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-55a. The court affirmed the grant of summary judgment for petitioner on the "substantial burden" claim, agreeing that the difficulty some congregants would face in walking to services does not constitute a substantial burden under RLUIPA. *Id.* at 23a.[3] However, the court of appeals reversed the grant of summary judgment on the congregations' claim that petitioner failed to accord religious entities equal treatment under its zoning ordinance. *Id.* at 24a-39a. The court explained that evidence in the record established

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[3] The court of appeals did not address the claim that petitioner's zoning ordinance "unreasonably limits religious assemblies, institutions, or structures within [the] jurisdiction." 42 U.S.C. 2000cc(b)(3).

that religious assemblies serve functionally the same purposes as the private clubs permitted within the business district, *id.* at 29a-30a, and that private clubs "do not serve [petitioner's] economic and commercial goals" to any greater extent than religious entities, *id.* at 37a. Because petitioner's "stated goal of retail synergy is pursued only against religious assemblies, but not other non-commercial assemblies," the court held that the zoning ordinance was non-neutral and discriminatory. *Id.* at 35a; see *id.* at 36a (petitioner's zoning law has "improperly targeted religious assemblies for dissimilar treatment and is therefore, not neutral"). The court also found that the ordinance was not generally applicable because petitioner pursued its economic and commercial goals "only against conduct motivated by religious belief." *Id.* at 37a.

Turning to petitioner's constitutional challenges, the court of appeals confined its analysis to RLUIPA's "equal treatment" provision, which was the only RLUIPA provision that the court of appeals concluded could provide the congregations a basis for relief. The court held that the equal treatment provision is a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. Pet. App. 42a-48a. The court concluded that the equal treatment provision simply "codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions." *Id.* at 48a. The court further held that such legislation was justified by the evidence before Congress documenting "a significant encroachment on the core First and Fourteenth Amendment rights of religious observers." *Ibid.*; see also *id.* at 41a (discussing evidence before Congress that zoning codes

"use individualized and discretionary processes to exclude churches, especially 'new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues'") (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000* (*Joint Statement*), 146 Cong. Rec. S7774 (daily ed. July 27, 2000)).

The court of appeals also rejected petitioner's Establishment Clause challenge to the equal treatment provision of RLUIPA. The court held that the equal treatment provision's codification of extant constitutional protections permissibly alleviated significant burdens on religious exercise. Pet. App. 48a-53a. Finally, the court found no merit to petitioner's Tenth Amendment challenge, because RLUIPA's equal treatment provision is valid Section 5 legislation that simply requires governments to conform their conduct to constitutional standards. *Id.* at 53a-55a.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 10-18), the court of appeals' holding that Congress had the legislative authority under Section 5 of the Fourteenth Amendment to enact the equal treatment component of RLUIPA's land use provisions does not warrant this Court's review, for two reasons.

First, there is no conflict in the circuits concerning Congress's authority to enact that provision. Quite the opposite, the decision below represents the first court of appeals' decision to address the constitutionality of either RLUIPA's land use provisions generally or its mandate of equal treatment in land use regulations in particular. The two district courts that have ruled on the constitutionality of the equal treatment provision

have upheld it. See *Williams Island Synagogue, Inc.* v. *City of Aventura*, No. 0420257CV, 2004 WL 1059798 (S.D. Fla. May 6, 2004); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). Likewise, virtually every district court that has addressed Congress's authority under Section 5 of the Fourteenth Amendment to enact RLUIPA's land use provisions has upheld the constitutionality of the law. See *Congregation Kol Ami* v. *Abington Township*, No. Civ. A. 01-1919, 2004 WL 1837037, at *9-*12 (E.D. Pa. Aug. 17, 2004), amended by 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *18-*19 (W.D. Tex. Mar. 17, 2004); *Primera Iglesia Bautista Hispana of Boca Raton, Inc.* v. *Broward County*, No. 01-6530-CIV (S.D. Fla. Jan. 5, 2004), slip op.; *Guru Nanak Sikh Society* v. *County of Sutter*, 326 F. Supp. 2d 1140, 1157-1161 (E.D. Cal. 2003), appeal docketed, No. 03-17343 (9th Cir. Dec. 24, 2003); *United States* v. *Maui County*, 298 F. Supp. 2d 1010, 1016-1017 (D. Haw. 2003); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 115-122 (D. Conn. 2003), appeal docketed, No. 03-9329 (2d Cir. Dec. 22, 2003); *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 234-238 (S.D.N.Y. 2003), vacated on other grounds, 386 F.3d 183 (2d Cir. 2004); *Life Teen, Inc.* v. *Yavapai County*, No. 01-1490 (D. Ariz. Mar. 26, 2003), slip op.; *Christ Universal Mission Church* v. *City of Chicago*, No. 01 C 1429, 2002 U.S. Dist. Lexis 22917 (N.D. Ill. Sept. 11, 2002), rev'd on other grounds, 362 F.3d 423 (7th Cir. 2004), petition for cert. pending, No. 04-591 (filed Oct. 29, 2004); *Freedom Baptist Church*, 204 F. Supp. 2d at 874.[4]

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[4] The sole exception is *Elsinore Christian Center* v. *City of*

Second, the court of appeals' decision is correct. Congress's Section 5 authority extends to the enactment of legislation designed to "enforc[e] the constitutional right to the free exercise of religion." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). RLUIPA's equal treatment provision, moreover, merely codifies existing constitutional protections against religious discrimination by prohibiting governments from treating religious assemblies "on less than equal terms" with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). Like race, gender, and ethnicity, religious affiliation is among the suspect classifications traditionally protected by the Equal Protection Clause. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962).

In addition, when the government permits secular exemptions to otherwise generally applicable government regulations, the Free Exercise Clause requires that government accord equal treatment to religion-based claims for exemptions that would cause no greater harm to its interests than the secular exemptions that are already allowed. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542-543 (1993) (internal quotation marks, brackets,

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Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), which held that RLUIPA exceeds Congress's legislative authority under the Fourteenth Amendment and the Commerce Clause. But an appeal of that decision is pending, see No. 04-55320 (9th Cir.), and, in any event, the district court in that case did not address Congress's power to enact RLUIPA's equal treatment provision.

and citation omitted); see also *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Religion Clauses * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 884 (1990) ("[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.") (citation omitted).[5]

Indeed, this Court in *Lukumi* applied strict scrutiny under the Free Exercise Clause to a land use provision. One of the ordinances *Lukumi* struck down prohibited the slaughter of animals outside of areas zoned for slaughterhouses. See 508 U.S. at 545. The Court held that the ordinance violated the Free Exercise Clause because it contained an exemption for commercial

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[5] See also, *e.g.*, *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359 (3d Cir.) (under *Lukumi*, the Free Exercise Clause requires the police department to provide exemptions to grooming standards for officers wearing beards for religious reasons where exemptions had been given for beards worn for health-related reasons), cert. denied, 528 U.S. 817 (1999); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) ("selective, discretionary application" of ordinance barring citizens from affixing signs and other items to telephone poles in a manner that disfavors religion "violates the neutrality principle of *Lukumi* and *Fraternal Order of Police*"), cert. denied, 539 U.S. 942 (2003); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1224 (C.D. Cal. 2002) (under *Lukumi*, the Free Exercise Clause prohibits discrimination against religion in land-use matters).

operations that slaughter small numbers of hogs and cattle, and because the City's refusal to allow comparable religious exceptions was not justified by a compelling interest. See *ibid.* "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. Thus, the failure to accord particular sects or religion in general equal treatment can only be justified by a compelling interest advanced by the least restrictive means. *Id.* at 521-532. RLUIPA's equal treatment provision requires no more.[6]

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[6] Petitioner has failed to identify any area in which RLUIPA's equal treatment provision would impose a greater restraint upon state or local governments than the Constitution itself would. But even if RLUIPA occasionally provides slightly more protection than the Constitution mandates, the law remains valid Section 5 legislation because, under its Section 5 power, Congress may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment's text * * * in order to prevent and deter unconstitutional conduct." *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1985 (2004) (quoting *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000), and *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 728 (2003)). In addition, as *Lukumi* makes clear, the equal treatment provision operates in an area subject to heightened scrutiny under the Constitution, which enhances Congress's power to impose prophylactic remedies. See *Hibbs*, 538 U.S. at 736. Furthermore, the legislation responds to a substantial legislative record documenting that religious entities "are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation," *Joint Statement*, 146 Cong. Rec. at S7774. See *Tennessee* v. *Lane*, *supra* (upholding Title II of the Americans with Disabilities Act as applied to access to the courts based on the historic record of unconstitutional treatment of individuals with disabilities).

Petitioner's argument (Pet. 11) that "a restriction of location or preference was never equated with a restriction on religious practice" is wrong. See, *e.g.*, *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (denial of use permit for mosque in area easily accessible to university students created substantial burden on religion in violation of the Free Exercise Clause); *Keeler* v. *Mayor & City Council*, 940 F. Supp. 879, 880, 883-884 (D. Md. 1996) (barring church from demolishing monastery and chapel and replacing it with more modern facilities was a substantial burden on free exercise); *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (denial of special use permit to operate religious school in church building created substantial burden on religion in violation of free exercise); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 183 (Wash. 1992) (restrictions on church altering its exterior substantially burdened its religious exercise in violation of the Free Exercise Clause). Indeed, this Court's First Amendment jurisprudence has long acknowledged that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)), and petitioner offers no reason why religiously motivated speech and assembly should be accorded different treatment. Cf., *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).[7]

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[7] In fact, two courts have held that the First Amendment's Free Speech and Assembly Clauses also prohibit discrimination against religious institutions with respect to land use. See

2. The court of appeals' holding that RLUIPA comports with the Establishment Clause also does not merit this Court's review (see Pet. 18-19). Again, this is the first court of appeals decision to address whether RLUIPA's equal treatment provision in particular, or the land use provisions in general, are valid under the Establishment Clause. Every district court to address the question has ruled that the land use provisions are consistent with the Establishment Clause. See *Congregation Kol Ami*, 2004 WL 1837037, at *12-*14; *Williams Island Synagogue*, 2004 WL 1059798, at *6; *Castle Hills First Baptist Church*, 2004 WL 546792, at *18; *Westchester Day Sch.*, 280 F. Supp. 2d at 238; *Maui County*, 298 F. Supp. 2d at 1014-1015; *Murphy*, 289 F. Supp. 2d at 122-124; *Life Teen, Inc.*, slip op. 27-30.

The decision is also correct. The equal treatment provision simply tracks the Establishment Clause's own prohibition on religious discrimination, and thus promotes, rather than runs afoul of, Establishment Clause principles. See *Lukumi*, 508 U.S. at 532 ("[I]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (government may not

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Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464, 468-471 (8th Cir. 1991); *Vineyard Christian Fellowship* v. *City of Evanston*, 250 F. Supp. 2d 961, 984 (N.D. Ill. 2003). RLUIPA's equal treatment provision thus also codifies existing constitutional protections for free speech and assembly as applied to religious adherents.

"prefe[r] those who believe in no religion over those who do believe").[8]

On October 12, 2004, this Court granted review in *Cutter* v. *Wilkinson*, No. 03-9877, to consider whether RLUIPA's separate statutory provision protecting the religious exercise of institutionalized persons is consistent with the Establishment Clause. The Sixth Circuit in *Cutter* ruled that, in light of the unique dynamics of the prison environment, RLUIPA's institutionalized persons provision violates the Establishment Clause. See 349 F.3d 257 (6th Cir. 2003). The Court may wish to hold this case pending its disposition of *Cutter*.

The United States does not object to that approach. It bears emphasis, however, that the narrow Establishment Clause question presented here is unlikely to be influenced by this Court's resolution of *Cutter*. The case at hand involves only the equal treatment mandate of RLUIPA's land use provisions. That mandate has no

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[8] To the extent that the equal treatment provision requires any accommodation of religion beyond what the Constitution itself mandates, it is constitutional. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987). Moreover, just last Term, the Court reaffirmed that " 'there is room for play in the joints' between" the Free Exercise and Establishment Clauses, such that government can accommodate religion beyond what the Free Exercise Clause mandates, without violating the Establishment Clause. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)); see also *Kiryas Joel*, 512 U.S. at 705 (the Court's cases "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987).

statutory counterpart in RLUIPA's institutionalized persons provision, and thus is not at issue in *Cutter*. Rather, the institutionalized persons provision in *Cutter* applies a statutory compelling interest test to state actions that substantially burden the religious exercise of institutionalized persons. See 42 U.S.C. 2000cc-1(a)(1) and (2). While the operation of that provision often helps to prevent sectarian discrimination in institutionalized settings, the RLUIPA land use provision at issue here is a distinct statutory directive that specifically and narrowly parallels the Constitution's own prohibition on religious discrimination in the precise context of land use regulation.[9]

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[9] Nor is there any overlap between this case and *Cutter* on the question of Congress's authority to enact the respective provisions of RLUIPA. The equal treatment provision upheld here reflects an exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. Congress, however, did not invoke its Section 5 power as a basis for enacting RLUIPA's institutionalized persons provision. Instead, Congress relied on its Commerce and Spending Clause powers. See 42 U.S.C. 2000cc-1(b)(1) and (2). At this stage, there has been no finding in the record of the present case either that petitioner receives federal funding or that petitioner's zoning decision affects interstate commerce.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied. With respect to the second question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Cutter* v. *Wilkinson*, No. 03-9877, or, in the alternative, should be denied.

Respectfully submitted.

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No. 04-469

IN THE

Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC., and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, MIDRASH SEPHARDI, INC.

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QUESTIONS PRESENTED

Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution in less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The questions presented are:

I.

Is RLUIPA § 2 (b)(1), 42 U.S.C. § 2000cc(b)(1), *appropriate* legislation under Section 5 of the Fourteenth Amendment, which empowers Congress to enforce violations of the Free Exercise Clause by states and local governments, in that it closely tracks established non-discrimination principles of this Court's Free Exercise and Equal Protection jurisprudence and codifies those standards for greater visibility and easier enforceability?

II.

Did Congress "establish a religion" in RLUIPA § 2(b)(1) by merely requiring equality of treatment of analogous religious and secular assemblies or institutions in local land use regulations and in their implementation, without preferences or hindrances to either religious or secular land uses?

III.

Are plaintiffs required to satisfy the "substantial burden" requirement of RLUIPA § 2(a) as a threshold matter before an

"equal terms" violation can be found under Section 2(b), even though the text, the structure of RLUIPA § 2 as a whole and its legislative history clearly indicate that the two subsections are operatively independent of one another and the only two Courts of Appeals to consider this issue have so held?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Midrash Sephardi, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In its attempt to frame questions worthy of review where there are none, Surfside engages in wholesale misstatements of the decision of the Court of Appeals for the Eleventh Circuit, its own zoning regulations and the underlying facts. Surfside also distorts and greatly exaggerates the reach of RLUIPA § 2(b)(1)–the only RLUIPA provision at issue here-as "federalizing local land use laws," "substantially affecting *neutral* zoning laws throughout the nation" and "substantially altering decades of free exercise and equal protection precedent." Pet. p. 10. In fact, RLUIPA § 2(b)(1) does none of these things.

RLUIPA addresses two areas in which Congress determined that statutory enforcement of religious liberty interests against state and local governments is appropriate: land-use regulations and their implementation (§ 2) and actions relating to institutionalized persons in their custody (§ 3). In the land use context, Congress sought, among other things, to protect religious land uses from discriminatory zoning processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country. Congress found "widespread" state and local discrimination against religious institutions by means of zoning regulations and witnesses presented "massive evidence" of a pattern of religious discrimination that frustrated a core aspect of religious exercise – the ability to assemble for worship. *See* Joint Statement of Senators Hatch and Kennedy, *146* Cong. Rec. S7774-01, S7774-75(2000); H.R. Rep. No. 106-219, at 21, 24 (1999). To this end, RLUIPA § 2(b), a new provision not found in the prior Religious Freedom Res-

toration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb to 2000bb-4, is directed at zoning codes that discriminate against, or among, religious institutions. 42 U.S.C. § 2000cc(b). *Id.*

The Eleventh Circuit held that in prohibiting the imposition or implementation of land use regulations in a manner that treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions, RLUIPA § 2(b)(1) "codifies the *Smith-Lukumi* line of precedent" and "Congress enshrined similar nondiscrimination principles in § 2(b)'s requirement that religious and nonreligious assemblies or institutions be treated equally." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1231, 1233 (11th Cir. 2004). It therefore readily concluded that RLUIPA § 2(b)(1)-the only provision Surfside was found to have violated- is a straightforward constitutional exercise of Congress's authority under § 5 of the Fourteenth Amendment and does not violate the Establishment Clause. *Id.* at 1235-1242.

This is the first ruling by a Court of Appeals on the constitutionality of RLUIPA § 2(b)(1) and does not conflict with any decision of this Court. Nonetheless, Surfside erroneously points to *Cutter v. Wilkinson,* 349 F.3d 257 (6th Cir. 2003), *cert. granted,* 73 U.S.L.W. 3229 (U.S. Oct. 12, 2004) (No. 03-9877) as a source of circuit conflict that would warrant this Court's review. *See* Pet. p. 21.

Cutter involved an entirely different provision of RLUIPA-§ 3-which provides institutionalized persons with protection from substantial burdens on religious practice

unless the government can demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means. 42 U.S.C. 2000cc-1. The Sixth Circuit declared that provision unconstitutional under the Establishment Clause and this Court will consider whether that provision, "which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control," is such a violation. 73 U.S.L.W. 3229. A similar provision in the land use context, RLUIPA § 2 (a), is not at issue here because the Eleventh Circuit held that Surfside did not violate that provision.

RLUIPA § 2 (b)(1) stands in stark contrast to § 3 or § 2 (a). It does not require the lifting of burdens or the providing of accommodations or preferences to religious land uses. It merely requires equality of treatment of analogous religious and secular entities in land use regulations. § 2(b)(1) is thus a model application of the neutrality principle embodied in both Religion Clauses-a principle it respects, not offends. Whatever its validity, *Cutter* is not inconsistent with the Eleventh Circuit's holding in this case.

COUNTERSTATEMENT OF THE CASE

Respondents, Midrash Sephardi and Young Israel of Bal Harbour, are two small Orthodox Jewish synagogues that share leased space at a second floor location in the business zoning district of the Town of Surfside, Florida. *Midrash*, 366 F. 3d at 1219-1221. Surfside's Zoning Code ("SZO") allows churches and synagogues only in one of eight designated districts-the "RD-1 two-family residential district"-and

only by way of a conditional use permit ("CUP") which requires prior approval of Surfside's Town Commission. *Id.* at 1219.

Midrash and Young Israel congregants are Orthodox Jews who are prohibited by their faith from using automobiles on their Sabbath. *Id.* at 1221.They must therefore live within walking distance of a synagogue. The RD-1 district is out of the normal walking range for a significant number of congregants, particularly the elderly, and is a barrier to their participation in congregational worship. *Id.*

Although churches and synagogues are prohibited in the business district, lodge halls and private clubs are permitted above the first floor. SZO § 90-152(b)(8), (18). *Id.* at 1220. A private club is broadly defined in the SZO as "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes,* but not primarily for profit and not primarily to render a service which is customarily carried on as a business." SZO § 90-2(20) (emphasis added). *Id.* at 1231. This definition, by its own terms, encompasses a broad spectrum of non-commercial, secular places of public assembly that serve the *social, educational or recreational* needs of Surfside's residents and tourists[1].

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[1] Ignoring the SZO definition of private clubs, Surfside falsely claims that "the business district also *excludes all other non-commercial assemblies of a 'public or semi-public character.'*"(emphasis supplied). Pet. p. 6.The citations to the rulings below bear out the falsity of this claim. As the Eleventh Circuit noted, under SZO § 90-41, "[c]onditional uses, which include

SZO § 90-152(a) states that its purpose is "to provide for retail shopping and *personal service*[2] needs of the town's residents and tourists" and that it is "intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.* at 1219-20. There appears to be no discernible reason why *religious* assemblies satisfy these articulated zoning objectives or, for that matter, any other factors normally cognizable in a zoning proceeding involving a commercial district, any less than *social, educational or recreational* assemblies.

In May 1999, Surfside initiated two state court actions against the Congregations which were removed to federal

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churches, synagogues, educational institutions, museums, off-street parking lots and garages, public and governmental buildings, and public utilities are "generally of a public or semipublic character . . . but because of the nature of the use and possible impact on neighboring properties, require the exercise of planning judgment. . ." SZO § 90-41(a). *Midrash*, 366 F. 3d at 1230, n.13. Thus, schools, museums, and governmental buildings, which presumably qualify as "institutions" under RLUIPA § 2(b), are the only assemblies or institutions that are specifically excluded from the business district because no conditional uses are permitted.

[2] Surfside again attempts to deceive this Court at Pet. p. 6 by misquoting and substituting "retail service" for "personal service" in its quote from SZO § 90-151(a) in an effort to explain away the exclusion of churches and synagogues as somehow being related to their non-commercial nature. *Compare Midrash,* 366 F. 3d at 1220 and Pet. Appx. I-147a.

court and subsequently dismissed without prejudice. *Id.* at 1222.

In July 1999, the Congregations filed suit under 42 U.S.C. § 1983, challenging SZO § 90-152 as discriminatory and unconstitutional under the Free Exercise and Free Speech Clauses of the First Amendment. *Id.* They also challenged the CUP requirement of SZO § 90-41 in the RD-1 district as an unconstitutional prior restraint on First Amendment rights. *Id.* Finally, the Congregations asserted that requiring their relocation to the RD-1 district would constitute a "substantial burden" on their free exercise rights under the Florida Religious Freedom and Restoration Act. *Id.* Surfside answered and filed a two-count counterclaim seeking declaratory and injunctive relief to enforce § 90-152 and to prohibit the Congregations from continuing at their current location, as well as civil penalties and attorneys fees. *Id.* at 1222.

In July 2000, Congress enacted RLUIPA, 42 U.S.C. § 2000cc, *et seq.*, which was signed into law on September 22, 2000. Shortly thereafter, the Congregations added a RLUIPA claim which asserted that SZO § 90-152's favorable treatment of private clubs and lodges relative to churches and synagogues violates the "equal terms" provision of RLUIPA (§ 2(b)(1)) and that the exclusion of synagogues from all of Surfside except the RD-1 district where many congregants can not walk on the Sabbath violated the "substantial burden" provision of RLUIPA (§ 2 (a)(1)). *Id.*

Both parties moved for summary judgment before and after RLUIPA became law. *Id.* The district court, in a series of

decisions, granted summary judgment in favor of Surfside on all seven counts of the Congregations' Third Amended Complaint, including all aspects of the Congregations' RLUIPA claim. *Id.* The district court also granted Surfside's counterclaim for an injunction. *Id.*

The Eleventh Circuit reversed, holding that SZO § 90-152, which permits private clubs and other secular assemblies but excludes religious assemblies from Surfside's business district, violates § 2(b)(1) of RLUIPA. *Id.* at 1219, 1231. The Eleventh Circuit held that, like a church or synagogue, a private club, as defined in SZO § 90-2(20), is an "assembly" within the meaning of RLUIPA § 2(b)(1) because it comprises a "group gathered for a common purpose[3]" *Id.* at 1230-31.

While noting that the Congregations' constitutional claims need not be reached "[b]ecause we sustain the congregations' RLUIPA challenge to the ordinance," *see id.* at 1219, n.1, the Eleventh Circuit found that the equal terms provision "codifies the *Smith-Lukumi* line of precedent."[4] *Id.* at 1233.

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[3] Because RLUIPA does not define "assembly," the circuit court construed that term in accordance with its ordinary or natural meaning.

[4] The Eleventh Circuit also held that the Congregations' CUP challenge was not yet ripe for review, *see id.* at 1224-25, and rejected the "substantial burden" challenge under RLUIPA §2(a)(1) on the grounds that "the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not

It therefore concluded that RLUIPA § 2 (b)(1) is a constitutional exercise of Congress's authority under the Fourteenth and Tenth Amendments and does not violate the Establishment Clause. *Id.* at 1219, 1235-1237.

REASONS FOR DENYING THE PETITION

In its decision, the Eleventh Circuit broke no new ground and presented no important or novel federalism concerns as Surfside claims, but closely tracked and codified established principles of this Court's Free Exercise and Equal Protection jurisprudence, in accordance with Congress' power under § 5 of the Fourteenth Amendment. This Court has noted that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). There is no reason for the Court to grant certiorari review and undertake that task at this early stage of the law's development, before any court of appeals has concluded that RLUIPA § 2 (b)(1) is unconstitutional. In any event, certiorari is not warranted because Surfside's constitutional and statutory challenges are without merit.

'substantial' within the meaning of RLUIPA." *Id.* at 1228. The Eleventh Circuit did not therefore rule on its constitutionality.

I. RLUIPA § 2(B)(1) IS APPROPRIATE LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Congress enacted RLUIPA following the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which struck down the "substantial burden" provision of RFRA, insofar as it applied to states and their municipalities, because Congress had exceeded its authority under § 5 of the Fourteenth Amendment by *substantively altering* and legislatively superceding this Court's interpretation of the Free Exercise Clause in *Smith* instead of simply *enforcing* the Clause. *Id.*, 521 U.S. at 532. RFRA was held not to be "appropriate" remedial legislation under §5, because there was no "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-20.

In reaching this conclusion, the *Boerne* Court noted that the "sweeping coverage" of RFRA ensured its "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter", *id.*, 521 U.S. at 532, and that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 534. RFRA was therefore held to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Id.* at 532.

RLUIPA § 2(b)(1), on the other hand, does precisely what RFRA did not. It simply codifies firmly-established neutral-

ity and general applicability principles of this Court's most recent Free Exercise jurisprudence in the land use context and does not attempt any substantive change in constitutional protections. "Each subsection [of RLUIPA] closely tracks the legal standards in one or more Supreme Court opinions codifying those standards for greater visibility and easier enforceability." 146 Cong. Rec. at S7775 A municipality's right to promulgate neutral zoning regulations of general applicability which reasonably restrict the location of churches and synagogues is simply not at issue here[5].

Surfside readily concedes that if RLUIPA § 2(b)(1) merely codifies existing constitutional principles, it is an acceptable use of Congress's § 5 remedial power under *Boerne* (Pet. p. 10), *but* grossly exaggerates the reach of RLUIPA § 2(b)(1). *See* p. 1, *supra.*

A. RLUIPA § 2(b) Merely Codifies the Free Exercise Clause's Prohibition Against Unequal Treatment In Land Use and Zoning Laws

In *Employment Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), this Court abrogated the application of strict scrutiny to neutral laws of gen-

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[5] Similar to RFRA, the core provision of RLUIPA, § 2(a), protects religious assemblies and institutions from substantial burdens imposed on them by local land use and zoning regulations, subject, however, to various jurisdictional limitations that were designed to overcome RFRA's infirmities. However, the constitutionality of the "substantial burden" provision under § 5 is not at issue here.

eral applicability that incidentally burden religious exercise but sustained the long standing prohibition against a government banning conduct only when "engaged in for religious reasons," *see id.* at 877. *Smith* also noted that "we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 ((citations omitted).

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993), this Court explained that a law is "neutral" if it does not target or single out religiously motivated conduct either on its face or in its operation. *Lukumi,* 508 U.S. at 533-40. A law fails the "general applicability" requirement if it burdens religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated. *Id.* at 543-46[6]. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543.

Lukumi applied *Smith* to a series of city ordinances that effectively outlawed the ritual of animal sacrifice practiced by followers of the Santeria religion. Although these ordinances were found to be neutral on their face, a me-

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[6] "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi,* 508 U.S. at 531.

ticulous examination of their effect in operation revealed that the ordinances were not neutral, singling out for prohibition only the killing of animals in Santeria rituals and excluding almost all other animal killings. *Lukumi,* 508 U.S. at 536-37. This selective operation of the ordinance "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons," causing religiously motivated conduct to be "singled out for discriminatory treatment." *Id.* at 537-38. Although the ordinances were claimed to advance two interests - preventing cruelty to animals and protecting public health- they were "underinclusive for [their asserted] ends" because they "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 543. They were not therefore generally applicable. For the same reasons, the ordinances failed both the compelling interest and narrow tailoring prongs of strict scrutiny because their "proffered objectives [were] not pursued with respect to analogous non-religious conduct." *Id.* at 546.

The Eleventh Circuit noted that by requiring equal treatment of secular and religious assemblies in zoning laws, RLUIPA allows courts to scrutinize a zoning scheme and determine whether a particular system of classifications adopted by a city subtly or covertly departs from the *Smith-Lukumi* requirements of neutrality and general applicability. 366 F. 3d at 1232.

As in *Lukumi*, the Eleventh Circuit meticulously scrutinized SZO § 90-152 and found that excluding religious assemblies from its business district, while simultaneously

allowing a broad spectrum of non-commercial secular assemblies for *social, educational or recreational* purposes, was strong evidence that Surfside improperly targeted religious assemblies because of their religious mission. *Id.* at 1232-35. Additionally, the justification advanced by Surfside for its disparate treatment, that the Congregations have "[n]ever held a social, communal, public service or other community affair event which is *unrelated to [their] religious and spiritual mission or purpose"* constituted further evidence that Surfside treated secular motivations more favorably than religious motivations" in violation of the neutrality principle. *Id.*

Another strong indicator of the essential hostility toward religion inherent in this zoning scheme is the fact that Surfside's asserted interests of achieving maximum economic benefit through the promotion of retail "synergy" and the concentration and development of commercial uses in its small shopping district are seriously undermined by the SZO's definition of private clubs as non-commercial enterprises that operate for "social, educational or recreational purposes"-uses incompatible with the asserted commercial goals. *Id.* They are further undermined by evidence provided by the Congregations that they contribute to commercial activity and that permitted private clubs include organizations that often meet weekly, monthly, or bi-monthly, and sometimes during non-business hours – hours of operation which fail to stimulate any increase in consumer foot traffic. *Id.* Other than conclusory assertions by Surfside's land use expert that private clubs are more social than churches and therefore stimulates increased patronage of local establish-

ments, Surfside provided no evidence that private clubs and lodges *actually* contributed to the business district in a way appreciably different than religious institutions. *Id.* § 90-152 is therefore substantially underinclusive with respect to Surfside's claimed interests because lodges and private clubs endanger Surfside's commercial interests to at least the same degree as would religious assemblies that are prohibited. § 90-152 is not therefore generally applicable. *Id.*

The fact that SZO § 90-41 classifies churches and synagogues with "institutions" such as schools, museums, and governmental buildings and several other non-analogous entities, none of which are permitted in the business district, is of no consequence. *Id.* Even assuming that non-free standing religious "assemblies" on the second floor, over banks or other storefront businesses, are analogous to the listed institutions, § 90-152 is *substantially* underinclusive and not generally applicable because a broad spectrum of social, educational and recreational assemblies are permitted in the B-1 district, while religious assemblies are not. *Lukumi*, 508 U.S. at 543. "General applicability" is not synonymous with universal applicability and allows for some exceptions or deviations[7].

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[7] *Lukumi* explicitly disclaimed any intention of "defin[ing] with precision . . . whether a prohibition is of general application" because, in that case, the challenged ordinances fell "well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. The "critical question" is "whether the circumference of legislation encircles a class so broad that it can

Finally, the underinclusiveness that subjected SZO § 90-152 to heightened scrutiny in the first place is the same reason why it fails strict scrutiny. *See Lukumi*, 508 U.S. at 546-47 (holding that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law is not narrowly tailored where the "proffered objectives [were] not pursued with respect to analogous non-religious conduct.").

This Court has stated that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in *rare cases*." *Lukumi*, 508 U.S. at 546. Rather than providing for the unspecified *rare* exception, RLUIPA § 2(b)(1) simply "render[s] a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority." *Midrash*, 366 F. 3d at 1232.

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be fairy concluded that religious institutions could he thought to fall within the natural perimeter." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 696 (1970)(Harlan, J., concurring). Thus, a law is clearly neutral when it confers a benefit "upon a wide array of nonsectarian groups as well as religious organizations . .. ." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989). It is possible that in some particular case the breadth of RLUIPA's "equal terms" coverage may somewhat exceed the *Lukumi* standard.

B. Religion-Based Discrimination Is Also Prohibited By The Equal Protection Clause

RLUIPA Section 2(b)(1) also codifies existing Supreme Court precedent under the Equal Protection Clause. Contrary to Surfside's contention, this Court's cases are clear that a statutory classification overtly or covertly based upon religion, warrants strict scrutiny, and not rational basis, review. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 (1982); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A classification that categorizes on such basis warrants heightened review because it is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

C. To the Extent That RLUIPA § 2 Incidentally Prohibits Any Constitutionally Permissible Conduct, It Prohibits Actions That Themselves Have "A Significant Likelihood Of Being Unconstitutional," Is Within Permitted Broader Swath and Is Congruent and Proportional to the Pattern of Religious Discrimination Documented by Congress

The Eleventh Circuit held that SZO § 90-152 violates RLUIPA § 2(b)(1) as well as the First and Fourteenth Amendments. *Midrash*, 366 F. 3d at 1234-35, 1238-39. A broad review to determine the extent, if any, that RLUIPA § 2(b)(1) exceeds the Constitution under some other set of cir-

cumstances would be inappropriate. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

However, even if this Court were to find that RLUIPA § 2(b)(1) may marginally extend beyond the bounds of Free Exercise Clause protections in some other case other than the one at bar, such as the rare case where a law that is not of general application survives strict scrutiny or where RLUIPA's "equal terms" coverage is found to somewhat exceed the "general applicability" standard not "defined with precision" in *Lukumi*, § 2(b)(1) is still an acceptable use of Congress's § 5 remedial tool because it prohibits discriminatory actions that themselves have "a significant likelihood of being unconstitutional." *Boerne*, 521 U.S. at 532.

Moreover, it is firmly established that the power to enforce the Amendment also allows Congress to prohibit a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," as long as such "prophylactic" legislation is "congruent" and "proportional" to the injury to be prevented or remedied. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81 (2000) (*citing Boerne*, 521 U.S. at 518); *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) [8].

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[8] In the racial discrimination context, for example, this Court has upheld provisions of the Voting Rights Act that prohibit practices and procedures resulting in discriminatory impact, without proof of intentional discrimination, as required by the Equal Protection Clause, on this basis. *See, e.g., Chisom v. Roemer,* 501 U.S. 380, 383-84 (1991); *City of Rome v. United States,* 446 U.S. 156, 177

Finally, in enacting RLUIPA § 2(b)(1), Congress identified a pattern of religious discrimination by the States and their municipalities in the land use area and a pattern of constitutional violations. *See* Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7774-75 (2000). Unlike in *Garret*, the substantial record that Congress developed amply demonstrates that the Act is congruent and proportional to the injuries it seeks to remedy. Surfside's attempt to minimize the weight of this record is not only unfounded but also unavailing. Unlike in *Garret*, the importance of the legislative record is greatly diminished here by the fact that the challenged statute prohibits very little unconstitutional conduct. RLUIPA § 2(b)(1) is thus "appropriate legislation" under §5 of the Fourteenth Amendment[9].

(1980); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971). That entails a far broader swath of conduct than at issue here.

[9] Similarly, when Congress engages in a constitutional use of its power under § 5 of the Fourteenth Amendment, the Tenth Amendment does not reserve that power to the States.*See New York v. United States*, 505 U.S. 144, 156 (1992). Nor does RLUIPA regulate the states or compel their enforcement of a federal regulatory program, *see Printz v. United States*, 521 U.S. 898, 935 (1997). It simply leaves individual states free to eliminate discrimination against religious institutions in any way they choose, so long as the discrimination is actually eliminated. *See Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 759 (1982).

II. RLUIPA § 2 (b)(1) DOES NOT ESTABLISH A RELIGION BY MERELY REQUIRING EQUALITY OF ZONING TREATMENT OF ANALOGOUS RELIGIOUS AND SECULAR ENTITIES, WITHOUT PREFERENCES OR HINDRANCES

A. Law Requiring Equal Zoning Treatment Does Not Violate the Neutrality Principle

Contrary to Surfside's contentions, RLUIPA § 2 (b)(1) does not give religious land uses any preferred zoning status. It does not give them the unfettered right to locate in any zoning district they desire regardless of whether other assemblies or institutions are permitted there. It merely requires that religious land users not be prohibited from operating on an even playing field with other users as mandated by the Free Exercise Clause. The Establishment Clause does not as a general matter forbid what the Free Exercise Clause requires.

Indeed, in a series of cases dealing with the issue of public educational institutions giving religious organizations equal access to fora they created to facilitate private (as opposed to school-sponsored, speech) by a broad array of private groups, this Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839,

845-46 (1995) (university program subsidizing broad array of student activities); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-120 (2001) (use of school facilities by community groups); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384,384-397 (1993) (same). *See also Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (allowing religious schools to receive government tuition vouchers on equal basis with secular schools reflects neutrality required by Establishment Clause).

Indeed, neutrality is the hallmark of both Religion Clauses. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (internal quotations and citation omitted). Neutrality is thus respected, not offended, when RLUIPA requires zoning laws to be as hospitable to religious assemblies as to like secular assemblies, free of government sponsorship or interference.

In cases involving prayer in public schools, the so-called "endorsement" test applied by this Court is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace v. Jaffree,* 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment); see also *Capital Square Review and Advisory Bd.* v. *Pinette,* 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment). There is no realistic danger that an objective observer, acquainted with the

Free Exercise Clause and the values it promotes, would perceive a law that requires equal treatment of like religious and secular assemblies in zoning regulations, otherwise being operated free of any government involvement, as a government endorsement of religion or any particular creed or a particular religious practice. *See Wallace*, 472 U.S. at 83 (O'Connor, J., concurring).

RLUIPA § 2(b)(1) also easily satisfies the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that (1) it has the appropriate, secular legislative purpose of preventing religious intolerance in the enactment or implementation of land use or zoning regulations, as does the Free Exercise Clause, (2) it cannot fairly be said to amount to government advancement of religion through the government's own activities or influence and (3) it does not foster any kind of government entanglement with religious affairs.

B. There Is No Circuit Conflict on This Issue

Contrary to Surfside's suggestion, no other court of appeals has even addressed the constitutionality of RLUIPA § 2(b)(1) under the Establishment Clause, much less declared it unconstitutional. This Court recently granted certiorari in a case raising this issue under the "substantial burden" provision of RLUIPA § 3 in the prisoner context. *See Cutter v. Wilkinson,* 349 F.3d 257 (6th Cir. 2003), *cert. granted,* 73 U.S.L.W. 3229 (U.S. Oct. 12, 2004) (No. 03-9877).

As pointed out at pp. 2-3, *supra*, *Cutter* involves a very different provision than the one at issue here. *Cutter* held that the "substantial burden" provision of RLUIPA § 3 "has the effect of impermissibly advancing religion by giving greater

protection to religious rights than to other constitutionally protected rights," 349 F.3d at 264, and also "of encouraging prisoners to become religious in order to enjoy greater rights". *Id.* at 266. Regardless of its validity, the Sixth Circuit's reasoning in *Cutter* is manifestly inapplicable to the "equal terms" provision of § 2 (b)(1). The latter provision does not give religious land uses any preferred zoning status but merely requires equality of zoning treatment of analogous religious and nonreligious entities. It can not be said to have the effect of giving religious assemblies zoning rights superior to those of nonreligious assemblies or of encouraging nonreligious assemblies to become religious in order to enjoy greater rights. *Cutter* is thus not in conflict with the Eleventh Circuit's holding in this case.

III. SATISFYING RLUIPA'S SUBSTANTIAL BURDEN TEST (§2(a)) IS NOT A STATUTORY PREREQUISITE TO A VIOLATION OF THE EQUAL TERMS PROVISION (§ 2(b)(1))

Surfside argues that to reach § 2(b)(1)'s "equal terms" provision the court must first make an initial finding that the SZO "substantially burdens" the synagogues' religious rights under § 2(a), and that the Court of Appeals found that it did not. Surfside then misquotes fragments of RLUIPA's legislative history as supporting this facially absurd proposition. In fact, the Eleventh Circuit construed § 2 (b)(1) in accordance with its plain text, the structure of § 2 as a whole, its legislative history and a prior ruling of the Seventh Circuit.

The Eleventh Circuit considered but did not reach a related question of statutory construction it raised *sua sponte*:

whether § 2(a)(2)'s threshold jurisdictional tests must be satisfied before § 2(b)'s equal terms provision applies, because it found that the congregations allege conduct satisfying the third jurisdictional prong of § (a)(2). It noted, however, that "the plain terms and structure of RLUIPA indicate that the jurisdictional prerequisites included in § 2(a) do not apply to § 2(b)'s prohibition on discrimination against and exclusion of religious institutions."

The question presented here by Surfside was neither raised before nor considered by the Court of Appeals[10] nor the District Court, and this Court should therefore not consider it. *See Pennsylvania Department Of Corrections et al . v. Yeskey*, 524 U.S. 206, 212-213 (1998).

Second, this argument lacks any merit and is contrary to the holdings of the two Courts of Appeals that have considered this issue. The words "substantial burden" do not appear in § 2(b) expressly, by reference or by implication. Although statutory phrases should not be read in isolation but rather with a view to their place in the overall statutory scheme," s*ee FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), "[i]t is generally presumed that Congress

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[10] In its brief to the Eleventh Circuit not included in the Petitioner's Appendix, Surfside argued that its "zoning ordinances do not violate the 'unequal terms' provision of RLUIPA because there are no private clubs in the tourist or business districts; furthermore, private clubs are not 'similarly situated' with churches and synagogues; and even if private clubs could be viewed as 'similarly situated' there is a rational basis for distinguishing between private clubs and churches and synagogues."

acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," s*ee, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538 (1994). Read in context, it is clear on the face of the statute that "the substantial burden [§ 2(a)] and nondiscrimination [§ 2(b)] provisions are operatively independent of one another." *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 762 (7th Cir. 2003). The Eleventh Circuit also agreed with this construction and no other Court of Appeals has held otherwise. Indeed, Surfside's reading of the statute would eviscerate the need for § 2(b) which requires proof of "discrimination" or "unequal terms", since, under § 2(a), the required proof of a "substantial" burden is sufficient to invalidate an offending land use regulation except perhaps in the *rare* case where strict scrutiny is met.

Moreover, RLUIPA's legislative history makes this explicit. See Statement of Rep. Canady, 146 Cong. Rec. E1563 (2000), H.R. Rep. 106-219, at 17 ("Section 2(b)(1) and (2).....directly address some of the more egregious forms of land use regulation, and *provide more precise standards than the substantial burden and compelling interest test.*"). *See also* Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775 ("The Act's protection for religious liberty.....is triggered only by a substantial burden on, *a discrimination against*, a total exclusion of, *or* an unreasonable limitation on the free exercise of religion.")(emphasis added).

In sum, Surfside's untenable construction of § 2(b)(1) is clearly contrary to the text and legislative history of RLUIPA and the holding of the two Courts of Appeals that have con-

sidered the issue. It does not merit this Court's further review.

CONCLUSION

For the foregoing reasons, Surfside's petition for a writ of certiorari should be denied.

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